Supreme Court, U.S.
FILED

No. 94 921 NOV 2 1 1994

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

TRI-STATE STEEL CONSTRUCTION CO., INC.
and
NATIONAL ENGINEERING &
CONTRACTING COMPANY, INC.
Petitioners,
v.
ROBERT B. REICH
and
THE OCCUPATIONAL SAFETY
& HEALTH REVIEW COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Tri-State Steel Construction Co., Inc. and National Engineering & Contracting Co.'s Petition For Writ of Certiorari

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136 pp

QUESTIONS PRESENTED

This Petition presents the "significant[]...question" left unanswered by this Court in *Dow Chemical Co. v. United States*, 476 U.S. 227, 237 (1986); *i.e.*:

Whether a warrantless, nonconsensual, physical intrusion by a government inspector into the enclosed, nonpublic area of an inherently outdoor business operation for nonobservational purposes violates the business operator's Fourth Amendment rights.

This Petition also presents the following related questions:

Whether, where information obtained during an unlawful, warrantless administrative search influences the governmental agency's decision to seek an inspection warrant, that warrant is invalid and any information obtained thereunder is to be suppressed.

Whether the exclusionary rule applies to an administrative adjudicatory proceeding, such as that before The Occupational Safety and Health Review Commission.

LIST OF PARTIES

The Petitioners are Tri-State Steel Construction Company, Inc. and National Engineering & Contracting Co., Inc.[1] The Secretary of Labor, Robert B. Reich, and The Occupational Safety and Health Review Commission are the Respondents.

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[1] National Engineering is an employee-owned corporation. Tri-State Steel is its wholly owned subsidiary.

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TRI-STATE STEEL CONSTRUCTION CO., INC.
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NATIONAL ENGINEERING &
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Petitioners

vs.

ROBERT B. REICH
and
THE OCCUPATIONAL SAFETY & HEALTH
REVIEW COMMISSION
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Tri-State Steel Construction Co., Inc. and National Engineering & Contracting Co., Inc. petition for a writ of certiorari to review the judgment of The United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit (App. 1a) appears at 26 F.3d 173 (D.C. Cir. 1994) and at 16 OSHC-BNA 1845. The Decision of The Occupational Safety and Health Review Commission (App. 18a) appears at 15 OSHC-BNA 1903 (1992). The Decision and Order of the Review Commission Administrative Law Judge (App. 74a) is not published.

JURISDICTION

The Judgment of Court of Appeals was entered on June 17, 1994. (App. 14a). The Court of Appeals' Order denying the Petitioners, Tri-State Steel and National Engineering's Petition For Rehearing was entered on August 22, 1994. (App. 16a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The constitutional provision here involved is the Fourth Amendment which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioners, Tri-State Steel and National Engineering, petitioned the Court of Appeals to review a final order issued by The Occupational Safety and Health Review Commission. The Court of Appeals had jurisdiction over the petition pursuant to 29 U.S.C. §660(a).

National Engineering is a construction company, and Tri-State Steel is its subsidiary. Both were subcontractors for a major reconstruction project in Cincinnati, Ohio, which involved several miles of intersecting, interstate highway. The project was let by the State of Ohio.

The State developed a traffic control plan to re-route traffic around construction areas. In April of 1989, in accordance with the plan, the general contractor set construction barrels at 50 foot intervals in a V-like formation around the Petitioners' work area, which consisted of a four-lane highway where two major interstates intersected. The enclosure encompassed a work area that was approximately 30 feet wide by 500 feet long.

The barrels isolated the highway's two center lanes and re-routed the traffic on to either the remaining left or right lane. Vehicles in the left lane were channeled south into Kentucky; those in the right lane had to go northward into Ohio. Once the vehicles were separated by the V-shaped barrel line, they could not cross back to the other traffic lane. As a result, some motorists who found themselves in the wrong lane cut between the barrels to reach the other lane.

The Petitioners controlled the work area between the barrels. They were removing and replacing the concrete pavement. When the criss-crossing traffic began, the Petitioners contacted the State of Ohio to request police protection and contacted the general contractor to reposition the barrels at closer intervals. When these measures proved ineffective, the Petitioners also placed debris and other obstructions between the barrels, again to no avail. Accordingly, the business agent for Tri-State Steel's ironworkers filed a Complaint pursuant to 29 U.S.C. §657(f)(1) with the Occupational Safety and Health Administration detailing the criss-crossing traffic problems.

In response, an OSHA inspector and his trainee drove to the area, pulled in between the barrels, and parked their vehicle in the cordoned work area. The inspectors did not seek, nor did they have, an inspection warrant. The Petitioners' representatives requested that they leave the area; however, they refused to do so claiming that the cordoned area was open public property. The Petitioners' counsel arrived and advised the OSHA compliance officer and his trainee to cease the inspection and to obtain an inspection warrant. Again, they refused to do so. Rather, they remained in the cordoned area for the rest of the day, taking measurements of the site, interviewing employees on the site, and videotaping the traffic flow. Despite the Petitioners' repeated objections, the two government agents returned to the cordoned worksite the next two work days and followed up on their inspection. At no time did they have an inspection warrant.

By the third day, the general contractor had placed the construction barrels at 10 foot intervals around the Petitioners' worksite and had strung orange plastic meshing between them. The compliance officer confirmed on the third work day that this completely abated the criss-crossing traffic problem. However, during his three-day inspection of the Petitioners' cordoned work area, the OSHA compliance officer allegedly observed two additional safety hazards in the area besides the criss-crossing traffic; *i.e.*, improperly used and stored flammable gasses, and improperly used welding rods. Accordingly, although the immediate problem of the criss-crossing traffic was abated, OSHA sought to expand its inspection to encompass the entire construction site which consisted of four miles of elevated highway and 36 bridges. When the Petitioners and the general contractor objected to OSHA's request, OSHA sought and obtained an inspection warrant for the expanded inspection.

By the time OSHA sought the expanded inspection, the singular problem of the criss-crossing traffic had been fully abated, as OSHA had confirmed. The compliance officer's observations during his warrantless, nonconsensual search of the two alleged hazards were the sole motivating reason for OSHA seeking the warrant to expand its inspection. On that basis, the warrant was issued. Thereafter, OSHA conducted a full-scale inspection of the entire project and, as a result, cited the Petitioners for several safety and health standard violations.

The Petitioners contested the citations before a Review Commission Administrative Law Judge. Petitioners argued that both OSHA inspections – the warrantless

inspection of the cordoned area, and the warrant-based comprehensive inspection – violated the Fourth Amendment. The ALJ upheld the warrantless inspection, accepting OSHA's contention that the cordoned area was a public right-of-way, and that the inspection was justified by the "plain view" doctrine. The ALJ also upheld the warrant-based inspection, finding the warrant to be justified on the basis of the two alleged hazards observed by the compliance officer during his initial, warrantless search.

On appeal, the Review Commission rejected the ALJ's reasoning regarding the warrantless search of the cordoned area. It found that, as matter of fact, the Petitioners' cordoned area was specifically isolated by the barrels to keep the public out of the area. Therefore, it held that the OSHA officers "were trespassing in an area that was open only to the Respondents' employees and closed off to the general motoring public." (App. 34a). It further held that, since the officers were not in a location where they were legally justified in being, they could not rely on the "plain view" doctrine. Nonetheless, the Review Commission upheld the validity of the warrantless inspection, finding that the OSHA agents' physical intrusion into the Petitioners' enclosed, occupied work area was justified under the "open fields" exception to the Fourth Amendment. In doing so, the Review Commis-sion expanded the doctrine beyond its previous scope to include the physical, nonobservational inspection of an enclosed, occupied, outdoor business. The Review Com-mission also upheld the validity of the warrant-based expanded inspection, agreeing that the compliance officer's observations of the two alleged safety hazards

during the initial warrantless search justified the full scope warrant.

In the Court of Appeals, Secretary of Labor for the first time argued that the Petitioners' subcontract with the general contractor expressly granted the OSHA inspectors a contractual right of entry to the cordoned area. The subcontract incorporated the general contractor's contract with the State of Ohio, which included a provision that federal safety and health laws were to be observed and "the work shall be subject to the inspection of the appropriate Federal agency." (App. 7a). Without benefit of a review of applicable Ohio State contract law, two members of the appeal panel held that this language created a "contractual right of entry" such that the OSHA compliance officers "could enter the construction site without further consent from Petitioners." (App. 7a). This holding directly contravened the finding of fact made by the Review Commission that the OSHA inspectors were "trespassing" on the Petitioners' work area.

Although he concurred in the result, Circuit Judge Williams disagreed with the majority's holding that the contract created a contractual right of entry. Nothing in the contractual language, he reasoned, could be read as a blanket abandonment of the Petitioners' expectations of privacy in their cordoned work area. Rather, relying upon the "open fields" doctrine, Judge Williams believed that the Petitioners had no reasonable expectation of privacy in the cordoned work area since it was outdoors, where it was subject to observation from passersby. Judge Williams did not disagree with the panel's acceptance of the Review Commission's determination that, because the OSHA compliance officer observed the other two alleged

hazards during his initial, warrantless inspection, these justified OSHA's other, expanded warrant-based inspection.

The Petitioners filed a Petition For Rehearing with the Court of Appeals on the grounds that the majority's holding that the contract created a contractual right of entry contravened the unchallenged finding of fact by the Review Commission that the OSHA compliance officers were trespassing on the Petitioners' cordoned work area. Petitioners also asserted that the "open fields" doctrine was misapplied by Judge Williams in his concurrence since this Court has consistently maintained the distinction between a constitutionally permissible viewing from a public area, and a physical intrusion into the private, occupied area of a legitimate outdoor business for a nonobservational purpose. The Petition For Rehearing was denied.

ARGUMENT

1. Certiorari Should Be Granted To Resolve The Seeming Conflict Between This Court's Existing Fourth Amendment Precedents Regarding The Propriety of A Warrantless, Physical Intrusion By Government Inspectors Into The Cordoned Area Of A Legitimate, Inherently Outdoor Business.

This Court has developed two lines of Fourth Amendment authority which, on the surface, seemingly allow for conflict. First, there is the constitutional protection accorded legitimate business operations from warrantless or otherwise unreasonable searches, which

protection is based on a business operator's "expectation of privacy in commercial property which society is prepared to consider to be reasonable." *New York v. Burger*, 482 U.S. 691, 699-700 (1987). See also, *Marshall v. Barlow's, Inc.* 436 U.S. 307 (1978), and *See v. City of Seattle*, 387 U.S. 541 (1967). On the other hand, there is the "open fields" exception to the Fourth Amendment which recognizes that, in certain circumstances, one cannot legitimately demand privacy from the observation of certain activities conducted out-of-doors in unoccupied open fields since, by their very character, such activities do not entail "personal and societal values protected by the Fourth Amendment." *Oliver v. United States*, 466 U.S. 170, 182-183 (1984).

These two lines of Fourth Amendment authority seemingly conflict where, as in this case, a government official without consent and without a warrant physically intrudes into the cordoned, nonpublic area of a legitimate but inherently outdoor business operation, such as construction, in order to conduct a nonobservational inspection. Is the operator of the cordoned construction site entitled to its legitimate expectation of privacy in its commercial operation; or, is the operator subject to a nonconsensual, warrantless search merely because its business is inherently out-of-doors and, therefore, always to be deemed "open" to any search, including a physical intrusion for a nonobservational purpose?

This Court left this question unanswered in *Dow Chemical Co., Inc. v. United States,* 476 U.S. 227 (1986). This Petition presents it with the occasion to answer this question and provide certainty as to the Fourth Amendment rights of outdoor business operations, and

as to the boundaries within which government officials must operate when inspecting such businesses.

The touchstone of Fourth Amendment analysis is whether one has a constitutionally protected reasonable expectation of privacy. *Oliver, supra*, 466 U.S. at 177, citing *Katz v. United States*, 389 U.S. 347 (1967). If one exhibits a subjective expectation of privacy[2], that expectation must be one society is prepared to recognize as reasonable. *Katz, supra*, 389 U.S. at 361. (Harlan J., Concurring.) The operator of a legitimate business has such an expectation. *New York v. Burger, supra.*

Certain activities in open fields are not of the type which society is prepared to recognize as legitimately entitled to the demand of privacy. Such open areas

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[2] The Petitioners had a legitimate subjective expectation of privacy in the cordoned work area. They controlled the area and retained the right to exclude others, including the public. (App. 34a). See generally, *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978). Although the majority of the Court of Appeals panel stated that the Petitioners granted a contractual right of entry to OSHA, this holding directly contravened the unchallenged factual finding by the Review Commission that the government officials were trespassing on the work area. (App. 34a). Moreover, whether consent is given to a government inspection is a question of fact to be determined from all of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). In this case, the Review Commission made the un-challenged finding that the cordoned area was under the Petitioners' control such that the government officials were trespassing upon it. On appeal, the Secretary failed to meet his burden to demonstrate that this finding was not based upon substantial evidence on the record as a whole, and further failed to meet his burden to demonstrate that consent was, in fact, given. 29 U.S.C. §660(a); and, *Schneckloth v. Bustamonte, supra.*

generally are accessible to public and governmental officials; *i.e.*, "by their very nature" such locations are "open and unoccupied, [and] are unlikely to provide the setting for activities as privacy is sought to be protected by the Fourth Amendment." *Oliver, supra*, 466 U.S. at 179 n.10. (Emphasis added). See *e.g.*, *United States v. Dunn*, 480 U.S. 294 (1987). (198 acre ranch). An "open field" may be neither "open" nor a "field" as those terms are commonly used; rather, the concept may including "any unoccupied or undeveloped area outside of the curtilage." *Oliver, supra*, 466 U.S. at 179 n.11. (Emphasis added). However, the crucial factor for determining whether a location constitutes an open field for purposes of the Fourth Amendment exception is "whether the government intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Id.* at 182-183.

Intrinsic to the open fields cases is the fact that the subject activity was being conducted out-of-doors in generally undeveloped and unoccupied areas. Second, the activity was of an unlawful type for which society was not prepared to grant a reasonable expectation of privacy. Third, the government agents were limiting their activity to an observational intrusion. See *e.g.*, *Oliver, supra;* and *Dunn, supra. See also, Hester v. United States*, 265 U.S. 57 (1924). (Contraband alcohol in a front yard).

In *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), this Court held that the taking of aerial photographs of a legitimate commercial area did not violate the Fourth Amendment because the pictures were taken of items which could be ordinarily observed from the public air space above the plant. Thus, Dow Chemical could have no expectation of privacy from observations

which were obtained from that public advantage point.[3] This Court, however, was extremely careful to limit its holding to a nonphysical intrusion into a legitimate outdoor business operation for observational purposes only.

> Any actual physical entry by EPA into any enclosed area would raise significantly different questions, because "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *See v. City of Seattle, supra*, 387 U.S. at 543, 87 S.Ct. at 1739. The narrow issue raised by Dow's claim of search and seizure, however, concerns aerial observation of a 2,000-acre outdoor manufacturing facility without physical entry.

Id. at 237. (Emphasis in original).

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[3] This Court continues to maintain this distinction. In *Florida v. Riley*, 488 U.S. 445, 454 (1989), Justice O'Connor noted that one does not have a reasonable expectation of privacy "from public observations" made "from the road or the sidewalk." Similarly, in *California v. Greenwood*, 486 U.S. 35, 40 (1988), this Court upheld the search of garbage left at the curbside since it was placed "in an area particularly suited for public inspection and, in a manner of speaking, public consumption for the express purpose of having strangers take it." On the other hand, one does not lose or have a diminished expectation of privacy where he or she shares a nonpublic area with a limited number of others. See, *Mancusi v. De Forte*, 392 U.S. 364 (1968), and *Minnesota v. Olsen*, 495 U.S. 91 (1990). In the instant case, the fact that the general contractor and representatives of the State of Ohio were permitted access to the Petitioners' work area for purposes of the contract similarly did not diminish their expectation of privacy.

The clear implication of this Court's language in is that the occupied and developed outdoor worksite of a legitimate business is not an "open field" for purposes of a physical intrusion to conduct a nonobservational search. When applying the open fields doctrine, this Court maintains the distinction between an "observation from a public vantage point where [a governmental agent] has a right to be," *California v. Ciraolo,* 476 U.S. 207, 213 (1986), and an "actual physical entry" for nonobservational purposes. *Dow Chemical Company, supra,* 476 U.S. at 237. For example, in *New York v. Burger, supra*, the subject business consisted of a junk yard located on an "open lot with no buildings." 482 U.S. at 693. Even though this legitimate business was conducted out-of-doors without commercial structures, this Court recognized that a search of the premises was subject to Fourth Amendment considerations of reasonableness. *Id.* at 702. Similarly, in *Donovan v. Dewey*, 452 U.S. 594 (1981), this Court held that an open stone quarry was subject to Fourth Amendment considerations; *i.e.*, a regulatory scheme that performed the basic function of a warrant. In neither case did this Court hold that Fourth Amendment considerations did not come into play pursuant to the open fields doctrine.

This Petition raises the fundamental constitutional issue of the applicability of the Fourth Amendment to searches of the delineated, nonpublic areas of legitimate out-of-door commercial businesses and when, if ever, the open fields exception to the Fourth Amendment applies to those searches. The tension between the Amendment and its exception can be resolved by a recognition that such a business maintains its reasonable expectation of privacy in such areas from physical intrusion by government agents for nonobservational purposes. Such

areas are occupied and used by the businesses and are not the kind of open, unoccupied and undeveloped areas, or fields, for which no expectation of privacy is to be expected. By granting this Petition, this Court can determine with clarity and certainty the constitutional right to be free from unreasonable searches for the myriad of commercial businesses and operations that are inherently conducted out-of-doors.

2. Certiorari Should Be Granted To Apply This Court's Rules Governing The Basis For, And The Scope Of, Inspection Warrants To Those Obtained For Searches Conducted By Administrative Agencies.

What began in this case as a review of a limited complaint about a singular traffic hazard in a discrete geographic area was expanded into a generalized inspection of over four miles of interstate highway and 36 bridges. This expansion was based upon the alleged observance of two other safety hazards during the three-day warrantless search of the Petitioners' work area. These observations were unlawfully obtained since the Compliance Officer's warrantless search violated the Petitioners' Fourth Amendment rights. This information, however, served as the motivating reason for OSHA seeking a warrant to expand its inspection since, by the time it applied for the warrant, it already knew that the singular traffic problem in the Petitioners' work area had been fully abated.

Under this Court's precedents, a warrant is invalid if illegally obtained information prompted the agency's

decision to seek the warrant. *Murray v. United States*, 487 U.S. 533 (1988). In such a case, the evidence procured pursuant to the warrant must be excluded. *Id.* In the instant case, OSHA sought the inspection warrant solely motivated by information illegally obtained during its initial warrantless inspection. Accordingly, the evidence obtained pursuant to the warrant should have been excluded.

The requirement that a warrant not be prompted by illegally obtained information is additional to the requirement that illegally obtained information be purged from a warrant before considering probable cause. Only the untainted information that remains, considered by itself, may establish probable cause for the warrant to issue. *Murray, supra*, 487 U.S. at 542. *See also, James v. United States*, 418 F.2d 1150 (D.C. Cir.) (1969). The illegally obtained information in this case should have been excluded from the Magistrate's consideration leaving only the fact that there was a complaint about a singular traffic problem in a limited geographic area that had been resolved. Such may have been sufficient "specific evidence of an existing violation." *Marshall v. Barlow's, Inc., supra*, 436 U.S. at 320, to serve as the basis for a warrant. However, the scope of that warrant should have been limited to the geographic area of this particular problem. The scope of an administrative inspection must bear an appropriate reasonable relationship to the violation alleged in the complaint by limiting its scope to the subject matter and specific location of the alleged hazard. *Trinity Industries v. OSHRC*, 16 F.3d 1455 (6th Cir. 1994); and, *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061 (11th Cir. 1982).

This case presents this Court with the fundamental constitutional issue of what evidence serves as the proper basis for the issuance of an administrative search warrant, and what conduct will invalidate the same. Additionally, by granting the Petition, this Court will resolve the issue of the appropriate scope of an administrative inspection warrant when such is based solely on a limited complaint.

3. Certiorari Should Be Granted To Resolve The Ongoing Controversy Whether The Exclusionary Rule Applies To An Enforcement Proceeding Before The Occupational Safety And Health Review Commission.

Since this Court's decision in *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Occupational Safety and Health Administration and the Secretary of Labor have maintained that the reasoning of that case should be applied to enforcement proceedings before The Occupational Safety and Health Review Commission. The Review Commission itself rejects that argument. *See, Secretary v. Sander Lead Co.*, 15 OSHC-BNA 1640 (1992). Three Circuit Courts have done the same, and have continued to apply the exclusionary rule to the Review Commission enforcement proceedings. See *e.g.*, *Pennsylvania Steel Foundry & Machine Co. v. Secretary*, 831 F.2d 1211 (3rd Cir. 1987); *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329 (5th Cir. 1986); and, *Trinity Industries v. OSHRC*, 16 F.3d 1455 (6th Cir. 1994). *See also, Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061 (11th Cir. 1982).

The exclusionary rule is designed to deter unlawful conduct. Exclusion is most compelling when the

administrative agency, like OSHA, controls the investigative function and supervises the investigative personnel who participates in the illegal search. In that context, the administrative scheme which governs OSHA inspections provides the mechanism for enforcing Fourth Amendment rights.

The holdings of the circuit courts is consistent with this Court's precedent. *See, One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965). (Exclusionary rule applied to forfeiture proceedings which are "quasi-criminal in character.") This approach also compliments this Court's directive that illegally obtained information should not be used to advance an improper warrant. *Murray v. United States*, 487 U.S. 533 (1988).

INS v. Lopez-Mendoza, *supra*, does not remove the exclusionary rule from an OSHA proceeding. There, the exclusionary rule was inapplicable in the civil hearing because evidence was used only in a collateral sense, and because the INS had its own comprehensive scheme for deterring constitutional violations. By contrast, OSHA's primary interest in using the unlawfully obtained information to prosecute cases against employers, such as Petitioners, Tri-State Steel and National Engineering.

Also at issue is whether the "good faith" exception to the exclusionary rule applies to Review Commission proceedings. In the instant case, however, this exception provides no solace to the Secretary. The good faith inquiry is an objective one. *United States v. Leon*, 468 U.S. 897 (1984). A government official, like the OSHA inspector in this case, cannot rely on the fact that a warrant issued, where that official knows or should have known that the search was tainted.

By accepting this Petition, this Court will resolve an important question of federal constitutional law regarding the applicability of the exclusionary rule to enforcement proceedings which has not been, but should be, resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA COURT

Argued February 23, 1994 Decided June 17, 1994

No. 92-1614

TRI-STATE STEEL CONSTRUCTION, INC., *ET AL.*,
PETITIONERS

V.

OCCUPATIONAL SAFETY & HEALTH REVIEW
COMMISSION, *ET AL.*,
RESPONDENTS

Petition for Review of an Order of the
Occupational Safety & Health Review Commission

Kent W. Seifried argued the cause and filed the briefs for petitioners.

John Shortall, Attorney, United States Department of Labor, argued the cause for respondents. With him on the brief was *Joseph M. Woodward*, Associate Solicitor, Occupational Safety and Health, and *Barbara Werthmann*, Counsel for Appellate Litigation, United States Department of Labor.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before MIKVA, *Chief Judge,* WILLIAMS and SENTELLE, *Circuit Judges.*

Opinion for the Court filed by *Chief Judge* MIKVA.

Concurring opinion filed by *Circuit Judge* WILLIAMS.

MIKVA, *Chief Judge:* The Occupational Safety and Health Administration ("OSHA") conducted two related inspections of a multi-employer bridge and highway construction project on which Petitioners, National Engineering & Contracting Company ("National") and its wholly-owned subsidiary Tri-State Steel Construction Company, Inc. ("Tri-State"), were subcontractors. OSHA cited Petitioners for violating several safety and health standards established pursuant to the Occupational Safety and Health Act of 1970. 29 U.S.C. §§ 651-678 (1988 & Supp. 1993). Petitioners contested the citations, alleging, *inter alia*, that OSHA's inspections of the construction site constituted unreasonable searches within the meaning of the Fourth Amendment.

After a hearing on the merits, an administrative law judge ("ALJ") held the searches to be constitutionally permissible. The Occupational Safety and Health Review Commission ("Commission") affirmed the ALJ's

conclusion, and Petitioners filed this petition for review. Because Petitioners lacked a reasonable expectation of privacy in the open areas of their construction site and OSHA inspected other areas of the site pursuant to a valid administrative warrant, we deny the petition for review.

I. Background

In 1989, National and Tri-State worked as subcontractors on a major reconstruction and rehabilitation project known as Project 8. Project 8 involved the restoration of 36 bridges in a four-mile stretch where three major highways converged in Cincinnati, Ohio. To promote both the safety of Project 8 workers and the convenience of area drivers, the State of Ohio developed, and the project's general contractor implemented, a traffic control plan to reroute traffic around the construction area. Petitioners bore no responsibility for designing or implementing the plan.

On the evening of April 27, 1989, the general contractor, acting in accordance with the traffic control plan, set barrels in a V-like formation around Petitioners' worksite area on Fort Washington Way, a four-lane highway intersecting the project area. The barrels isolated the highway's two center lanes by rerouting traffic to the other left- and right-hand lanes. The right lane channeled traffic north toward Dayton, Ohio; the left lane channeled traffic south into Kentucky. Once cars split off at the "V," they had no further opportunity to cross back to the other lane of traffic.

On April 28th, Fort Washington Way motorists found themselves channelled in directions in which they did not

want to go. Because the barrels were set fifty feet apart, motorists were able to cut between them and across the work area in order to reach their desired lanes. When the criss-crossing traffic problem first began, Petitioners contacted the State of Ohio to request police protection for their workers. The State directed the general contractor to reposition the barrels by placing them at 25-foot intervals. When this proved ineffective, Petitioners placed debris and other items between the barrels to discourage traffic from cutting through the work area. When the criss-crossing problem persisted, an agent of Petitioners' iron workers filed a § 8(f)(1) Complaint with OSHA detailing the nature and location of the safety hazard to which site employees were exposed. 29 U.S.C. § 657(f)(1).

OSHA promptly commenced an inspection of the specific area of Fort Washington Way described in the Complaint. On May 4, 1989, without seeking an administrative inspection warrant, OSHA dispatched a compliance officer and trainee to the construction site. The OSHA officers drove between the barrels and parked their vehicle in the cordoned area of the highway. When Tri-State representatives asked them to leave the OSHA officers refused, claiming that the cordoned area was public property to which they had a right of access. Shortly thereafter, Petitioners' attorney arrived and advised the OSHA officers to cease their inspection and to obtain an administrative inspection warrant if they wished to continue.

The OSHA officers remained on-site for the remainder of the afternoon. The compliance officer took

measurements of the Fort Washington Way construction site and took state-ments from on-site employees. The trainee videotaped traffic flow at the site. The compliance officer returned to the site the next day to ensure that a policeman was present. On May 8th, the general contractor placed barrels at 10-foot intervals around Petitioners' worksite and strung orange plastic meshing between them. When the compliance officer returned to the construction site on Monday, May 8th, he confirmed that the traffic control problem had abated.

During his three day inspection of Fort Washington Way, the compliance officer allegedly observed two safety hazards in addition to the moving vehicular traffic — improperly used and stored flammable gases and improperly used welding rods. Based on these observations, OSHA sought to expand its inspection to encompass the full four miles of elevated roads and bridges that defined Project 8. Both Petitioners and the general contractor objected to this decision and demanded that OSHA obtain an administrative inspection warrant before expanding the scope of its inspection.

Citing the multiple safety hazards it had observed in its limited inspection of Petitioners' construction site, OSHA applied for and obtained an administrative search warrant for all of Project 8. From May 10–16, 1989, OSHA conducted a full-scale inspection of Project 8 and cited Petitioners for several additional safety and health standards violations it observed. Petitioners contested the citations before an administrative law judge arguing that both the warrantless inspection on May 4th and the more comprehensive warrant-based inspection on May 10–16 violated the Fourth Amendment. After a hearing on the merits, the ALJ held the inspections to be constitutionally

permissible. The ALJ up-held OSHA's warrantless inspection because the cordoned area of Fort Washington Way was a public right-of-way and the inspection encompassed only those aspects of the construction "which were in plain view of all." Finding the additional safety and health standards violations that OSHA uncovered in its initial inspection to be a valid basis upon which to issue an administrative search warrant, the ALJ upheld OSHA's warrant-based inspection as well.

On appeal, the Commission rejected the ALJ's reasoning regarding the initial search, but upheld the constitutionality of OSHA's inspections. Because the compliance officers were "trespassing in an area that was open only to the Respondents' employees," the Commission determined that the inspection could not be justified under the "plain view" doctrine. Nonetheless, the Commission upheld OSHA's warrantless inspection of Petitioners' worksite because Petitioners' construction site fell within the "open fields" exception to the Fourth Amendment. The Commission affirmed the ALJ's conclusion that OSHA had inspected the entirety of Project 8 pursuant to a valid administrative search warrant. Petitioners seek review of these determinations.

II. Discussion

A. OSHA's Warrantless Inspection

Whether a governmental search or seizure implicates the Fourth Amendment usually involves a two-fold analysis. To come under the rubric of the Fourth Amendment, the subject of the search must show that it

"has manifested a subjective expectation of privacy in the object of the challenged search." *California v. Ciraolo*, 476 U.S. 207, 211 (1986). In addition, society must be "willing to recognize that expectation as reasonable." *Id.* Whether a party has manifested a subjective expectation of privacy is a question of fact, reviewed under the clearly erroneous standard. *United States v. Welliver*, 976 F.2d 1148, 1151 (8th Cir. 1992). Whether that subjective expectation is objectively reasonable is a matter of law subject to *de novo* review. *Id.* Because we conclude that the contractual arrangements between Petitioners, the general contractor, and the federal government preclude Petitioners from establishing any reasonable expectation of privacy in the open areas of Project 8, we need not assess the subjective element of Petitioners' claimed privacy interest. Similarly, in disposing of Petitioners' claims through conventional Fourth Amendment analysis, we need not reach the more novel question of whether Petitioners' construction site falls within the Fourth Amendment's "open fields" exception.

The contract between the State of Ohio and the general contractor provides that "[w]hen the United States Government pays all or any portion of the cost of a project, the Federal laws and the rules and regulations made pursuant to such laws must be observed by the Contractor, and the work shall be subject to the inspection of the appropriate Federal agency." That federal funds were used in Project 8 is undisputed. Because National's subcontract with the general contractor "specifically incorporated . . . the Principal Con-tract between the Owner and the Contractor," National and, derivatively, Tri-State were on notice that "appropriate" federal inspectors could enter the construction site without further consent from

Petitioners. In addition, the State of Ohio Department of Transportation had contractually reserved the right to enter Project 8. We find the contractual right of entry that Petitioners and the general contractor afforded "appropriate federal inspectors" and the State of Ohio to be incompatible with any expectation of privacy that Petitioners may have manifested in the open areas of Project 8. Accordingly, we uphold OSHA's warrantless inspection of Petitioners' construction site.

Petitioners miss the Fourth Amendment mark in arguing that OSHA is not the "appropriate" federal agency to which the contract refers. The reasonableness of Petitioners' subjective expectation of privacy cannot turn on which governmental agency is empowered to enforce Petitioners' compliance with safety and health standards. Whether it be OSHA or the Federal Highway Administration, the reasonableness of Petitioners' subjective expectation of privacy is unchanged. Moreover, although Petitioners challenge OSHA's jurisdiction over Project 8 indirectly, through their Fourth Amendment claim, they do not do so directly. Consequently, we leave undisturbed the Commission's finding that OSHA was the appropriate federal agency to enforce safety and health standards at the construction site.

B. *OSHA's Warrant-based Inspection*

We turn now to the validity and scope of OSHA's adminis-trative search warrant. OSHA does not contest Petitioners' assertion that the contractual right of entry

that State and federal inspectors enjoyed on Project 8 lands did not extend to the materials and effects over which Petitioners had exclusive dominion. Consequently, Petitioners retained a legitimate expectation of privacy in those areas and aspects of their construction site that lay beyond plain view. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312-13 (1978) (recognizing the businessperson's "constitutional right to go about his business free from unreasonable official entries upon his private commercial property"). Although the State of Ohio consented to OSHA's expanded search of Project 8, its consent could not validly extend to property and effects over which it lacked dominion. *Cf. Donovan v. A.A. Biero Constr. Co.,*, 746 F.2d 894, 901-02 (D.C. Cir. 1984) (explaining that third-party "authority to consent to search of a common area extends to most objects in plain view, [but] it does not automatically extend to the interiors of every enclosed space within the area"). OSHA concedes that its search encompassed such property. Accordingly, the constitutionality of OSHA's expanded inspection of Project 8 turns on the validity of the administrative search warrant that OSHA procured. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

To obtain a valid search warrant, OSHA must establish administrative probable cause in one of two ways. First, OSHA may demonstrate "specific evidence of an existing violation." *Marshall v. Barlow's*, 436 U.S. at 320. Alternatively, OSHA can show that " 'reasonable legislative or admin-istrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' " *Id.* citing *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967). OSHA's warrant application relied on both specific evidence of current violations and the Secretary's administrative plan to establish probable cause to search

Project 8 in its entirety. The Commission rightly found that "a full-scope inspection was called for under the provisions of a general administrative plan for the enforcement of the Act."

Under the terms of OSHA's then-effective administrative plan, a § 8(f)(1) Complaint inspection in a low-hazard industry could be expanded to cover the entire worksite if the Complaint inspection led to " 'information indicating the likelihood of serious hazards in other portions of the [workplace.].' " The Commission found that OSHA's initial, Complaint-based inspection "provided it with ample reason to believe that it was likely to discovery other serious hazards" in the remaining areas of the highway rehabilitation project. We have no reason to disturb that finding.

Although Petitioners rely on *Donovan V. Sarasota Concrete Co.*, 693 F.2d 1061 (11th Cir. 1982), to argue that OSHA may not rely on a Complaint about specific violations in a delimited area to establish administrative probable cause to conduct a full-scale worksite investigation, they misapply *Donovan* to the facts of this case. The Commission did not find that OSHA's May 4th Complaint inspection itself justified the full-scale investigation of Project 8. Rather, the Commission determined that OSHA's administrative plan justified a more expansive site inspection because, in the course of investigating the complaint, OSHA observed multiple, potentially serious safety violations beyond those mentioned in the Complaint.

Petitioners further argue that the administrative search warrant was invalid because it was based upon an application in which OSHA "knowingly and intentionally or with reckless disregard for the truth" made material "misrepresentations." Specifically, Petitioners contend that OSHA's application failed to inform the magistrate that the traffic safety problem at the worksite had abated and that Petitioners expressly objected to OSHA's warrantless search. Although Petitioners believe this information to be "critical " to any determination of administrative probable cause, the Commission found, and we agree, that they "do not undercut the Secretary's showing of administrative probable cause for a full-scope investigation." Notwithstanding OSHA's failure to mention that the site's traffic safety hazard had abated, OSHA's warrant application contained ample evidence of additional safety hazards at the Project 8 construction site.

III. Conclusion

The contractual right of entry that Petitioners and the general contractor afforded "appropriate federal inspectors" and the State of Ohio renders unreasonable any expectation of privacy that Petitioners may have manifested in the open areas of the Project 8 construction site. OSHA's warrantless inspection of the site was therefore constitutional. OSHA conducted its expanded inspection of Project 8 pursuant to a valid administrative search warrant. The petition for review is

Denied.

WILLIAMS, *Circuit Judge*, concurring in the result: I agree with the court that Tri-State had no "reasonable expectation of privacy", and therefore no 4th amendment claim, in the entirely open areas of the construction site. In my view, however, the contract between the State of Ohio and the general contractor (incorporated into Tri-State's contract by reference) is not the explanation. Rather, it is the completely open character of the area involved, fully exposed to the view of the thousands of motorists who passed by the site–itself only two highway lanes wide. *See United States v. Dunn*, 480 U.S. 294 (1987). *Dunn* makes reasonably clear, I think, that the "open fields" doctrine that it applied is simply a special case of the more general doctrine that a reasonable expectation of privacy is necessary for a successful 4th Amendment claim. *See Id.* at 300 (invoking "open fields" doctrine and observing that the extent of the "curtilage" of a house protected by the 4th Amendment "is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself"). Tri-State could not have a reasonable expectation of privacy in an area that anyone driving through Cincinnati could at will peer into–and *through*.

I think the court implicitly concedes that this is what drives the outcome when it acknowledges, as did OSHA, that whatever rights of entry were established by the contracts did not extend to the areas concealed from "plain view". Maj. Op. at 7 Nothing in the contracts so limits them. In fact, Tri-State's objections to reliance on the contracts seem to me quite persuasive. Surely agreement to inspection by *A* should not normally be read as a blanket abandonment of expectations of privacy

against the invasions of *B* through *Z*; to say that it does is to create a rather astonishing gap in 4th Amendment protections. Further, nothing in the contract, which simply warns that the site "shall be subject to inspection of the appropriate Federal agency", says that such inspections may occur without observance of ordinary legal norms.

APPENDIX B

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 92-1614 **September Term, 1993**

Tri-State Steel Construction, Inc., et al.,

Petitioners,

v.

Occupational Safety & Health Review Commission, et al.,

Respondents

PETITION FOR REVIEW OF AN ORDER
OF THE OCCUPATIONAL SAFETY
AND HEALTH REVIEW COMMISSION

BEFORE: **Mikva,** Chief Judge; **Williams** and **Sentelle,** Circuit Judges

JUDGMENT

This cause came on to be heard on the petition for review of an order of the Occupational Safety and Health

Review Commission and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the petition for review is denied, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner
Deputy Clerk

Date: June 17, 1994

Opinion for the Court filed by Chief Judge Mikva.

APPENDIX C

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 92-1614 **September Term, 1993**

Tri-State Steel Construction, Inc., et al.,

Petitioners,

v.

Occupational Safety & Health Review Commission; Lynn Martin, Secretary of Labor, U.S. Department of Labor

Respondents

BEFORE: **Mikva,** Chief Judge; **Williams** and **Sentelle,** Circuit Judges

O R D E R

Upon consideration of petitioners' petition for rehearing, filed July 27, 1994, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner
Deputy Clerk

APPENDIX D

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND
HEALTH REVIEW COMMISSION
1825 K STREET N.W.
4TH FLOOR
WASHINGTON D.C. 20006-1246

FAX
COM (202) 634-4008
FTS 634-4008

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket Nos. 89-2611and 89-2705 (Consolidated)
TRI-STATE STEEL CONSTRUCTION INC.,	:	
and	:	
NATIONAL ENGINEERING CONTRACTING COMPANY,	:	
Respondents	:	

DECISION

Before: FOULKE, Chairman; WISEMAN and MONTOYA, Commissioners.

BY THE COMMISSION:

Introduction

These consolidated cases arise out of an Occupational Safety and Healthy Administration ("OSHA") inspection of a multi-employer construction worksite. Both National Engineering & Contracting Company ("National") and its wholly-owned subsidiary, Tri-State Steel Construction, Inc. ("Tri-State"), were subcontractors on that project. As a result of the inspection, OSHA issued these two employers a total of five citations, alleging numerous violations of the Act. Following a hearing on the merits of the five citations, alleging numerous violations of the Act. Following a hearing on the merits of the five citations, the Review Commission's administrative law judge ("the ALJ" or the "judge") issued his decision, in which he affirmed most of the alleged violations, vacated others, and rejected the Fourth Amendment defense that had been raised jointly by the two employers. For the reasons that follow, we affirm the judge's ruling on the Fourth Amendment issues that are before us. However, we reverse the judge and vacate the only citation item–citation no. 1, item 9, in Docket No. 89-2705–that remains before us for a decision on the merits.[1]

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[1]Five of the nine issues listed in the Direction for Review are no longer before us because they focused on the merits of citation items that the Secretary has since withdrawn. Only the three issues relating to the Respondents' Fourth Amendment defense and the one issue relating to the merits of item 9 remain before us on review. Contrary to the Secretary's arguments on review, the Fourth Amendment

I. THE VALIDITY OF THE WARRANTLESS INSPECTION

A. Background

The construction project at issue was a highway rehabilitation project that is referred to throughout the record as "Project 8." This project, involving the reconstruction of 36 bridges, covered four miles of roadway on three interstate highways that converge in or near Cincinnati, Ohio. Work was begun on the project in February 1989 and was still continuing at the time of the hearing in these cases (in August 1990).

The prime contract on Project 8 was between the Ohio Department of Transportation ("ODOT" or "the project administrator") and John R. Jurgensen Co. ("Jurgensen" or "the general contractor"). Jurgensen in turn had a subcontract with National covering all of the bridge reconstruction work except for "deck overlay." And National had a subcontract with Tri-State to perform all of the steel erection work that was involved in National's contract with Jurgensen.

Because this project involved work on sections of interstate highway that were elevated over the city streets of downtown Cincinnati, it was necessary to develop a

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issues stated in the Direction for Review are not limited in scope to the evidence gathered in support of item 9. At a minimum, the validity of the evidence introduced in support of *all* items affirmed by the ALJ and *not* subsequently withdrawn by the Secretary is at issue before us on review. *See* 29 C.F.R. § 2200.92(a).

348-page-long traffic control plan to assure that the work was performed safely and sequentially (in planned phases), while allowing traffic to continue to flow on those lanes that were not currently being rehabilitated. The plan was developed by ODOT and then approved by the Federal Highway Administration ("the FHWA"). Jurgensen had exclusive responsibility for implementing the plan, including placement of barrels and traffic control devices as directed in the plan. It is undisputed that neither National nor Tri-State had *any contractual* responsibility for traffic control measures. Moreover, any changes in the plan could only be implemented following ODOT approval.

The events leading up to the challenged inspection in these cases began on Thursday evening, April 27, 1989, when Jurgensen made certain changes in the placement of barrels and traffic control devices. These changes allowed National and Tri-State employees to begin working in the two center lanes of two adjoining bridges, while traffic continued to flow on the two outer lanes of those bridges.[2] Following the directions stated in ODOT's

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[2]The task of Tri-State's ironworkers was to repair or replace the "end dams" (or "expansion dams") and "expansion joints" on the two bridges, which are referred to throughout the record as bridges 6 and 2. Dams and joints are two types of devices used in bridges to allow expansion and contraction during changing weather conditions. The "end dams" or "expansion dams" are located at either end of a bridge and extend horizontally across the width of the road. In contrast, the "expansion joints" run the same direction as the road. Because they are buried under the surface of the roadway, they become a pat of the bridge itself. The rehabilitation work performed by Tri-State involved the use of cutting torches to cut the old welds, the replacement of old expansion joints when necessary, and the use of welding machines to make new welds. This work is frequently done from a sitting or crouching position, and the worker's vision is restricted by the welder's hood, making the worker particularly vulnerable to exposure to passing vehicles if adequate traffic control measures are not taken.

traffic control plan, Jurgensen rearranged the barrels in a V-shaped pattern, with the two center lanes in the center of the V. Barrels and traffic control devices were also set up on the roadway leading up to bridge 6 in an attempt to compel motorists to go either to the left or to the right of the blocked-off work area. The barrels were placed at 50-foot intervals beginning more than a mile before reaching the work area and continuing on both sides of the work area itself.

On Friday morning, April 28, rush hour traffic confronted this new traffic configuration for the first time, and serious problems quickly developed. Many motorists found themselves being channeled into lanes that took them in directions they did not want to go. On several occasions, motorists responded to the discovery that they were in the wrong lane by passing between two barrels, over the two "blocked-off" center lanes, and into the opposite outer lane, where they then re-entered the traffic flow.[3] In taking this route, they passed right through the area where National and Tri-State employees were working, creating a hazard to the work crews.

National's employees were responsible for demolition and removal of the roadway pavement covering the "expansion joints" and "dams" so that Tri-State employees could then come in and do their rehabilitation work. National employees were also responsible for removing the existing guardrails on the concrete parapets along the sides of the elevated highways, as part of the process of installing new parapets. See Part IV of this decision, *infra*.

[3]Given the slow speed of the traffic, due to the congestion, and the 50-foot spacing between the barrels, a motorist who wished to cross over to the opposite lane found it easy to do so.

As the hazard became increasingly apparent that Friday morning, the project superintendent for National and Tri-State ordered measures taken to protect the employees.[4] Trucks and other vehicles were moved into position to create barricades around the end dams and expansion joints where the employees were working. *See supra* note 2. In addition, guardrails that had been removed from the parapets were placed on the ground between the barrels. However, state inspectors soon ordered removal of these stacked guardrails because they were creating a hazard to the motorists. Finally, project superintendent Taylor had his office worker contact higher-level state employees. As a result of this discussion, ODOT ordered Taylor to remove the employees from the bridges.

At the contractors' routine bi-weekly progress meeting that same morning, Taylor raised the above-described hazard, on Fort Washington Way, as an issue. After discussion, ODOT agreed to allow Jurgensen to bring in additional barrels, thereby reducing the intervals between barrels from 50 to 25 feet.[5] For unexplained reasons, however, this doubling of the barrels was limited to the area motorists passed through before reaching bridge 6. Thus, it had little or no effect on the hazard created by the vehicles crossing through the work area. The Respondents, however, made some efforts to protect their

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[4]As indicated, National is the parent company of Tri-State. On project 8, the Respondents' three highest level management officials, including project superintendent Taylor, held their respective positions with both National and Tri-State. Work crew foremen, however, worked either for National or for Tri-State.

[5]Once agreement was reached on this change in the traffic control measures, ODOT instructed Taylor to send his employees back into the work area. The employees therefore returned to bridges 6 and 2 later that same day.

work crews–by placing trucks and welding machines in strategic positions and by using employees with "slow" signs as a supplemental traffic control measure.

On May 4, 1989, almost a week after the hazard first arose, a representative of the worksite employees filed a formal complaint of unsafe working conditions with the local OSHA area office.[6] The complaint described the hazard that existed on Fort Washington Way and identified Jurgensen as the employer.[7] OSHA compliance officer Cannon ("CO Cannon" or "Cannon") and Co trainee Boatman arrived at the Fort Washington Way worksite to investigate the complaint's allegations within hours of receiving the complaint.[8] Upon arriving at

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[6]The Respondents assert that the complaint was filed by union business agent Shinkle of the Iron Workers Union, which represented Tri-State employees at the worksite. However, the affidavit filed in conjunction with OSHA's warrant application, see discussion *infra*, states that the complaint was filed by "a representative of employees of the general contractor on the construction site, John R. Jurgensen Co." The complaint itself is not in the record. The record does contain a summary of the complaint that was prepared by OSHA and attached to the warrant application. However, that summary contains no information about the person who filed the complaint.

[7]The complaint summary, *see supra* note 6, described the alleged hazard as follows:

> Barrels used to contain traffic on Fort Washington Way west bound east of the interchange for north and south bound I-75 traffic are not set to prevent truck and auto traffic from driving between them in order to change lanes. Employees are working between two such rows of barrels and subject to being struck by vehicles changing lanes through the openings between the barrels.

[8]OSHA responded promptly because it considered the complaint to be an allegation that employees were exposed to an imminent danger. OSHA also considered the complaint to be an allegation of conditions in violation of the

bridge 6, CO Cannon drove his van between two barrels and parked in the two "blocked-off" center lanes of the highway. Almost immediately after stepping out of the van, CO trainee Boatman began videotaping the scene, and he continued videotaping on an intermittent basis throughout the two hours the CO's spent at the worksite.

Upon reaching the work crew, CO Cannon introduced himself and presented his credentials to the first worker he met. He asked that worker to identify the supervisor in charge of the worksite. The worker directed him to Tri-State's general foreman Hunter, *see supra* note 4, and Cannon proceeded to re-present his credentials to Hunter. At this point, Cannon learned for the first time that all of the exposed workers were employed by Tri-State–apparently, the National employees had completed their work in the area, *see supra* note 2–and not by Jurgensen, the employer that was named in the complaint.

Hunter did not express any objection to the presence of the OSHA compliance officers, but he did inform them that he would have to notify his supervisor or someone

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Occupational Safety and Health Act of 1970, 27 U.S.C. §§ 651-678 ("the Act"). Thus, CO William J. Wilkerson included the following statement in his warrant application affidavit, which we discuss *infra*: "In my opinion . . . the complaint alleges serious conditions that are covered by 29 CFR 1926.201, 29 CFR 1926.202, Section 5(a)(1) of the Act and other parts." Sections 1926.201 and 1926.202 are found in Subpart G of Part 1926, which contains provisions governing, among other things, traffic control measures during construction activities. Section 1926.201 regulates the use of flaggers, while section 1926.202 regulates the use of barricades. Section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1), the Act's "general duty clause," provides that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees."

else from National. Approximately 20 to 30 minutes after the arrival of the OSHA inspectors, project superintendent Taylor, Hunter's supervisor, and assistant project superintendent Febus arrived at the work area. They apparently came up to the work area from the office trailer shared by National and Tri-State, which was located directly below one of the sections of elevated highway that was being rehabilitated. According to CO Cannon, these management officials did not object to his presence at the worksite, although they did ask that the entire group go down to the office trailer to discuss the matter. Cannon refused this suggestion on the ground that he was dealing with an imminent danger situation that "needed to be addressed now." For this reason, he held an abbreviated opening conference with Taylor, Febus, and Hunter at the work area in question rather than a formal conference at the office trailer.

Shortly after the arrival of Taylor and Febus, a Jurgensen representative and ODOT's onsite representative in charge of traffic control also arrived at the work area. Finally, approximately an hour after the inspectors' arrival, the attorney representing both National and Tri-State arrived. Immediately upon joining the group, the attorney formally demanded that the CO's cease their inspection and obtain an administrative inspection warrant. Cannon responded, first, by refusing the request, arguing that he did not need a warrant because he was on public property, and, second, by continuing his inspection and investigation. As indicated previously, the CO's remained at the worksite for

approximately two hours.[9] They then went down to the office trailer area, where they met with representatives of Jurgensen, the general contractor.

There was no patrol car at the site on May 4 (or indeed at any time prior to OSHA's arrival). However, CO Cannon received assurances that a patrolman would be sent out the next day for the purpose of ticketing motorists who disobeyed the existing traffic signals by passing through the work area. Cannon was already back at the work area on Friday morning, May 5, when the patrolman arrived at approximately 9:00 a.m. However, this measure also failed to abate the hazard. Thus, the CO observed that, while the patrolman was in the process of writing out a ticket to one offending motorist, one or two others would pass between the barrels and through the work area. On Friday, the hazard was alleviated only when the employees walked off the site because of a strike, which was not related to the hazard. Tri-State's employees were back at work on bridges 6 and 2 by the following Monday morning, if not earlier.

Cannon testified that he returned to the work area on Monday, May 8, in a continuing effort to resolve the

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[9]During this two-hour period, Cannon personally observed four cars and one truck cross over the two center lanes. These included vehicles going in both directions, *i.e.*, from the left-hand lane to the right-hand lane, and vice verse. One of these incidents, in which a Jaguar passed through the work area and came very close to a group of Tri-State employees, was videotaped by CO trainee Boatman (Exh. C-12). The inspection on May 4 was limited to the work area identified in the employee representative's complaint, and Canon's focus was on "documenting the criss crossing traffic." Cannon determined that the barrels arranged in rows on both sides of the work area were spaced irregularly, with the distances between barrels varying from 40 feet to 70 or 75 feet apart. Some additional protection was provided to the employees by two trucks and three or four welding machines that were strategically placed in relation to the work crews.

traffic control problem and also to conduct employee interviews. He again limited his inspection to the work area on bridges 6 and 2, and he again observed that, while the patrolman was writing out a ticket to one offending motorist, others at the same time were passing through the work area unimpeded.

At some time during the morning of May 8, the CO returned to his office to meet with the area director. Subsequently, the area director and *Jurgensen's* president reached agreement by telephone on a means to eliminate the hazard. Jurgensen agreed to reduce the distance between barrels to 10 feet (by adding more barrels on both sides of the work area) and then to erect a "snow fence" connecting the barrels along one side of the work area. After obtaining ODOT's approval for these changes in the traffic plan, Jurgensen fully implemented them by the end of the work day on Monday.

By then, OSHA's attention had already shifted elsewhere. During a telephone call made from the worksite to the OSHA office earlier that same morning, the area director instructed Cannon to expand his inspection to cover the entire worksite, *i.e.*, all of project 8. Accordingly, the CO attempted to set up an opening conference with representatives of all of the contractors that were then working on the project. This fell through, however, when Jurgensen's representative, and also the representative of National and Tri-State, demanded that Cannon obtain an administrative inspection warrant before expanding his inspection beyond the geographical area and physical hazard described in the employee representative's complaint. OSHA therefore obtained

such a warrant on the following day, May 9. On the day after that, May 10, Cannon again returned to the worksite to serve that warrant and to begin the second phase of his inspection, which we will discuss separately, *infra*.[10]

B. Analysis

On review, the Secretary presents three alternative legal theories in support of her contention that the warrantless phase of the inspection did not violate the Fourth Amendment.[11] The ALJ held that the warrantless inspection was valid and apparently based his holding on two of the Secretary's arguments–validity under the "public right-of-way" rationale and validity under the "plain view" doctrine. For the reasons that follow, we reject the judge's reasoning, but not his ultimate conclusion. Instead, we agree with the Secretary's third alternative theory–that the warrantless inspection was valid under the "open fields"doctrine. We therefore

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[10]The record contains an alternative chronology of events. This alternative chronology is based primarily on Cannon's deposition testimony, but it also finds some support in his testimony at the hearing, particularly during cross-examination. Under this version of events, the decision to conduct a full-scope inspection of project 8 and the agreement between the area director and Jurgensen's president on the installation of the snow fence both occurred on Friday, May 5, rather than Monday, May 8. Most of the work on implementing this plan was done on Sunday night, May 7, and accordingly, when the CO returned on the site on Monday morning, May 8, most of the snow fencing had already been installed. From our point of view in resolving the issues that are before us, it makes little if any difference which of these chronologies is correct.

[11]The Secretary also argues that the evidence should not be suppressed in these cases even if the Fourth Amendment was violated. Since we conclude herein that the Respondents' Fourth Amendment rights were not violated, we have no occasion to reach these alternative arguments, which focus on the application of the exclusionary rule and the good faith exception to the exclusionary rule in the context of these proceedings.

affirm the judge's determination that the Respondents' Fourth Amendment rights were not violated, but for reasons different than those stated by the judge.

The first theory that we address is essentially the argument that CO Cannon made when he rejected the demand of the Respondents' attorney to discontinue his inspection and obtain an administrative inspection warrant. As indicated, the CO's response was that he did not need to get a warrant because he was on public property. Both the ALJ and the Secretary have supported this claim. However, for the reasons that follow, we disagree.

The basis for this "public right-of-way" argument is the decision of the United States Supreme Court in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) ("*Barlow's*"). In *Barlow's*, the Court held that the Fourth Amendment generally prohibits warrantless, nonconsensual inspections of business establishments under the Act. More specifically, it held that, because the employer in that case refused to agree to a voluntary inspection, OSHA was required under the Fourth Amendment to obtain an administrative inspection warrant before it could inspect the "the nonpublic area"of the employer's manufacturing establishment:

> The critical fact in this case is that entry over Mr. Barlow's objection is being sought by a Government agent. Employees are not being prohibited from reporting OSHA violations. What they observe in their daily functions is undoubtedly beyond

> the employer's reasonable expectation of privacy. *The Government inspector, however, is not an employee. Without a warrant he stands in no better position than a member of the public.* What is observable by the public is observable, without a warrant, by the Government inspector as well . . . [However, the fact than an employer permits employees into a work area] furnishes no justification for federal agents to enter a place of business from which the public is restricted and to conduct their own warrantless search.

436 U.S. at 314–15 (emphasis added). *See also Concrete Constr. Co.*, 15 BNA OSHC 1614, 1617, 1992 CCH OSHD ¶ 29,681, p. 40,240 (No. 89-2019, 1992) (the Fourth Amendment "does not require a warrant for a nonconsensual inspection of a workplace to the extent the workplace is open to the public").

Accordingly, in order for the Secretary to prevail on her "public right-of-way" theory, we must view the compliance officer, acting without a warrant, as being "in no better position than a member of the public." *Barlow's*, 436 U.S. at 315. We must conclude that the CO limited his inspection to areas that were open to the public and did not enter areas "from which the public is restricted." *Id.* This we cannot do. At the hearing, the compliance officer admitted that the warrantless phase of the inspection took place in a work area that the public was not permitted to enter and that the "purpose" of placing the barrels around the two center lanes "was to keep members of the motoring public out of that area." In addition, the Respondents have argued that the

contract between ODOT and National had the effect of removing those lanes that were being reconstructed from public use and placing them under the exclusive control of the Respondents. Finally, we emphasize the testimony of CO Cannon concerning the second and third days of his inspection. Cannon testified that, on both of those days, a patrolman was sent out to the work area in question to issue tickets to motorists who drove between the barrels and across the two center lanes. We conclude that this unrebutted testimony establishes conclusively that the work area was closed to the public and not part of the public right-of-way. Motorists could not have been ticketed for driving in areas that were open to the public.[12]

For this same reason, we also reject the second of the Secretary's three alternative theories. The Secretary argues, and the judge held, that the warrantless inspection of the work area in question was justified under the "plain

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[12]We further note the inconsistency between the Secretary's arguments before us and the Secretary's position at the time she issued her citations. As a result of her investigation of the employee representative's complaint and her warrantless inspection of the area described in the complaint, OSHA issued to Tri-State a citation alleging a willful violation of section 5(a)(1) of the Act, *see supra* note 8, and proposing a $9000 penalty. The Secretary's allegation was that Tri-State violated the Act in the following manner: "Employees were allowed to work in an area that is part of an interstate highway system known as Ft. Washington Way westbound without adequate protection provided for employees *to prevent automobile and truck traffic from driving through the work area* subjecting employees to being struck by such vehicles" (emphasis added). We find this allegation--in essence, that Tri-State violated the general duty clause by not taking adequate measures to keep the public out of the work area--to be incompatible with the Secretary's claim that the CO had a right to be in the work area because he was merely going into an area that was open to the public.

view" doctrine, which is a recognized exception in the case law to the Fourth Amendment's warrant requirement. We agree, however, with the Respondents that the "plain view" doctrine does not apply to the challenged inspection.

There are two significant limitations to the "plain view" doctrine, both of which render it inapplicable to the cases now before us. "The first of these is that plain view *alone* is never enough to justify the warrantless seizure of evidence." *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971) ("*Coolidge*"). Instead, the "plain view" doctrine can only be applied when the OSHA inspectors make their "plain view" observations from a location where they are legally justified in being. *See id.*, 403 U.S. at 466; *Illinois v. Andreas*, 463 U.S. 765, 771 (1983) ("*Andreas*").

"The second limitation is that the discovery of evidence in plain view must be inadvertent. . . . [W]here the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different." *Coolidge*, 403 U.S. at 469–70. *See also id.*, 403 U.S. at 471 n.27 ("This Court has never permitted the legitimation of a planned warrantless seizure on plain view grounds . . . and to do so here would be flatly inconsistent with the existing body of Fourth Amendment law"); *United States v. Marbury*, 732 F.2d 390, 399 (5th Cir. 1984) ("Marbury").

The cases now before us are distinguishable from the "plain view" doctrine cases on both of these grounds. Thus, the OSHA CO's were not "lawfully in a position," *see Andreas*, 463 U.S. at 771, to observe the conditions they observed during their warrantless inspection of the work area described in the employee representative's

complaint. Instead, they were trespassing in an area that was open only to the Respondents' employees and closed off to the general motoring public. Moreover, the observations of the CO's were hardly inadvertent. On the contrary, they went to the workplace for the express purpose of investigating a complaint of unsafe working conditions and inspecting the work area described in the complaint. In sum, we conclude that the "plain view" doctrine cannot be used to justify a three-day-long warrantless OSHA inspection conducted over the employer's clearly-stated objections and demands for a warrant.[13]

Nevertheless, although we disagree with the judge's reasoning, we agree with his ultimate conclusion that the warrantless inspection at issue here did not violate the Fourth Amendment. Indeed, the Fourth Amendment did not even apply in this context because the warrantless

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[13]The cases cited by the ALJ and by the Secretary do not convince us otherwise. The judge cited *Stephenson Enterp., Inc. v. Marshall*, 578 F.2d 1021 (5th Cir. 1978), for the proposition that "the observations [the compliance officer] made on the highway after parking his vehicle which were in plain view of all was not a constitutional violation." However, the "plain view" observations that were referred to in *Stephenson Enterp.* were made during the course of a consensual workplace inspection. The compliance officer was therefore lawfully in the place from which he made his observations because the employer had consented to the walkaround inspection.

The cases cited by the Secretary in support of the judge's reasoning are also distinguishable on similar grounds. *See, e.g., Ackermann Enterprises, Inc.*, 10 BNA OSHC 1709, 1982 CCH OSHD ¶ 26,090 (No.80-4971, 1982) (CO inadvertently viewed violation from employer's parking lot after receiving permission from the employer's representative to wait for a management official in the parking lot).

phase of the inspection fell within the Amendment's "open fields" doctrine. Under the "open fields" doctrine:

> [A]n individual may not legitimately demand privacy for activities conducted out of doors, in fields, except in the area immediately surrounding the home [*i.e.*, the "curtilage," *see infra* note 14]. . . . This rule is true to the conception of the right of privacy embodied in the Fourth Amendment. . . .
>
> . . . . There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. . . . [Therefore,] the asserted expectation of privacy in open fields is not an expectation that "society recognizes as reasonable."

Oliver v. United States, 466 U.S. 170, 178–79 (1984) ("Oliver"). Similarly, we conclude that there is no societal interest in protecting the asserted privacy of the highway rehabilitation activities that are at issue before us in these proceedings.[14]

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[14]In arguing before us that the Fort Washington Way worksite was entitled to protection under the Fourth Amendment, the Respondents rely heavily on a case in which the United States Court of Appeals for the Seventh Circuit recognized the existence of a "business curtilage" exception to the "open fields" doctrine. *United States v. Swart*, 679 F.2d 698, 702 (7th Cir. 1982). "The curtilage concept originated at common law to extend to the area immediately surrounding *a dwelling house* the same protection under the law of burglary as was afforded the house itself." *United States v. Dunn*, 480 U.S. 294, 300 (1987) ("Dunn") (emphasis added). As discussed in *Dunn*, the concept has been incorporated into Fourth Amendment analysis, and the domestic curtilage is considered to be protected under the Fourth Amendment even though it may literally be both a field and open. It is not at all clear under the case law, however, that a business has a "curtilage" in the same sense that a home does not. Even if it does, we fully agree with the Secretary that the concept of a "business curtilage" has no application to the situation at issue before us:

We recognize, of course, that the area inspected during the warrantless first phase of the inspection at issue here was not a field at all, but rather an elevated section of interstate highway. Nevertheless, the work area can still be classified as an "open field" for Fourth Amendment purposes: "[T]he term 'open fields' may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither 'open' nor a 'field' as those terms are used in common speech." *Id.*, 466 U.S. at 180 n.11. *See, e.g., United States v. Fahey*, 769 F.2d 829 (1st Cir. 1985) ("open fields" doctrine applied to mining site in open desert); *Marbury*, 732 F.2d at 398 (doctrine applied to large tract of commercial property, including gravel pits and roadways).

The Respondents challenge the Secretary's reliance on the "open fields" doctrine by claiming that the doctrine does not apply here because it only "permits a warrantless search upon property from which no effort has been made to exclude the public." We agree with the Secretary, however, that "[i]t is only by ignoring extensive caselaw that such a statement could be made." Thus, for example, in *Dunn, supra*, note 14, the law enforcement agents made a warrantless entry onto a 198-acre ranch,

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A "business curtilage" presumably would be the land surrounding and associated with a fixed place, s in *Swart*. Here, there is no office, plant, or other commercial building to which a curtilage would attach. There were only the open areas of the highways and bridges.

See generally Pearl Meadows Mushroom Farm, Inc. v. Nelson, 723 F. Supp. 432, 439–41 (N.D. Calif. 1989).

crossing over the perimeter fence and three interior fences, including a barbed-wire fence, in order to reach their vantage point where they could look into the interior of a barn. Nevertheless, the Court held that, under the "open fields" doctrine, there was no Fourth Amendment violation–even if it accepted the rancher's argument that the barn was "an essential part of his business." 480 U.S. at 303–04.[15] *See also Ackermann Enterprises, Inc., supra* note 13, 10 BNA OSHC at 1712, 1982 CCH OSHD at p. 32,839 ("There is no violation of fourth amendment rights when a government agent's observations occur in 'the open fields' . . . even if the government agent trespasses on private property to make his observations").[16]

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[15]Citing *Oliver*, 466 U.S. at 182–83, the *Dunn* Court noted that it had "expressly rejected the argument that the erection of fences on an open field--at least of the variety involved in these cases and in the present case-- creates a constitutionally protected privacy interest." 480 U.S. at 304. In *Dunn*, as in *Oliver*, the Court was dealing with fences that were designed only to keep trespassers out (and, in *Dunn*, to keep livestock in). The *Dunn* Court suggested that these types of fences must be distinguished, for Fourth Amendment purposes, from privacy fences that are designed to prevent outsiders from observing what lies within. In the cases now on review, we conclude that the barriers at issue fall within the same category as the fences that were at issue in *Oliver* and *Dunn*. As the Secretary correctly observed in her review brief, "virtually all of [Tri-State's] construction activities took place in full view of motorists passing by on the open lanes of traffic" and "[t]he widely-spaced traffic barrels obviously did nothing to impede this view." Nor were they intended to accomplish anything more than keeping motorists out of the work area.

[16]In *Oliver*, the Court applied the"open fields" doctrine even though the police, upon arriving at a farm, ignored a locked gate with a "No Trespassing" sign posted, followed a footpath that led around one side of the gate, and eventually reached a marijuana patch in a highly secluded area that could not be seen from any point of public access. As noted by the *Dunn* Court, the *Oliver* Court held that the steps taken to keep the public off of this private property did not create a reasonable expectation of privacy. 480 U.S. at 304 (citing 466 U.S. at 182).

II. THE VALIDITY OF THE EXPANDED INSPECTION

A. Background

1. The warrant application

On May 9, 1989, the day after the three contractors (Jergensen, National and Tri-State) blocked its attempt to expand its inspection beyond the Fort Washington Way work area, OSHA went into the United States District Court for the Southern District of Ohio, Western Division (hereafter "the district court") to obtain an administrative inspection warrant. OSHA sought authorization for a full-scope, comprehensive inspection of project 8. In support of this warrant application, OSHA filed an affidavit executed by OSHA compliance officer William J. Wilkerson ("CO Wilkerson" or "Wilkerson"), a "duly authorized [OSHA] agent," and four attached exhibits, which we describe herein.

Under the Supreme Court's *Barlow's* decision, the Secretary's burden of proof, in seeking this full-scope inspection warrant, was to establish "administrative probable cause." This she could do by meeting either of the Court's two alternative tests–the "specific evidence test" or the "administrative plan test": "For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that . . . a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources . . . ." *Barlow's*, 436 U.S. at 320–21. Here, OSHA

filed a hybrid warrant application that sought to justify a full-scope inspection of project 8 under either or both of the Court's alternative tests.

Specifically, the warrant application filed on May 9 relied upon three primary factors as the basis of OSHA's probable cause showing:

(1) The Section 8(f)(1) Inspection. In paragraph 2 of his affidavit, CO Wilkerson informed the magistrate of OSHA's receipt of the employee representative's complaint on May 4, 1989, and the resulting investigation of that complaint, including the workplace inspection, on May 4, 5, and 8, 1989. A summary of the complaint, *see supra* notes 6 & 7, was attached to the applicatoin as Exhibit A. Wilkerson averred that OSHA's complaint inspection had been required under the terms of section 8(f)(1) of the Act, 29 U.S.C. § 657(f)(1), because OSHA had determined that: (1) "[t]he complaint meets the requirements of Section 8(f)(1) of the Act," (2) "the complaint alleges serious conditions that are covered by 29 CRF 1926.201, 29 CFR 1926.202, Section 5(a)(1) of the Act and other parts," *see supra* note 8, and (3) "there are reasonable grounds to believe that such violations exist or have existed during the last six months so as to require an inspection under Section 8(f)(1) of the Act."[17]

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[17]As indicated above, Wilkerson averred in his affidavit that the employee representative's complaint met the "formality requirements" of section 8(f)(1) of the Act. These requirements are listed in Chapter IX of OSHA's Field Operations Manual ("FOM"), which was attached to the warrant affidavit as Exhibit B. To meet these requirements, a complaint of unsafe or unhealthful working conditions must: "(1) Be reduced to writing (either on an OSHA-7 Form or in a letter); (2) Allege that an imminent danger or a violation threatening physical harm (i.e., a hazard covered by a standard or by the general duty clause) exists in the workplace; (3) Set forth with reasonable particularity the grounds upon which it

Wilkerson also described the results of OSHA's section 8(f)(1) inspection, as follows:

> The walkaround inspection, which included the hazards described in the complaint, has resulted in the identification of an imminent danger safety hazard and the immediate abatement of same. The additional safety hazards observed thusfar have included:
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> –improper use and storage of flammable gases,
> –failure to remove welding rods from welding cable clips,
> –inadequate protection of workers from moving vehicular traffic.

Finally Wilkerson informed the magistrate of the refusal of Jurgensen, Nationald, and Tri-State to permit the inspection "to continue" and of the demand of these three employers that OSHA obtain an administrative inspection warrant.

(2) The Administrative Plan. In paragraph 3 of his affidavit, CO Wilkerson informed the magistrate of

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is based. . . . and (4) Be signed by at least one employee or employee representative." Section 8(f)(1) implicitly requires the Secretary to determine whether a complaint meets the formality requirements set forth above. The statute also expressly requires the Secretary to determine whether "there are reasonable grouhnds to believe" that the violations or imminent danger hazards alleged inthe complaint actually exist. "If upon receipt of [the complaint] the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists."

OSHA's claim that its request for a full-scope administrative inspection warrant was being made pursuant to "a general administrative plan for the enforcement of the Act derieved from neutral sources" within the meaning of *Barlow's*. Specifically, Wilkerson averred that "[t]he desired construction worksite inspection is also part of an inspection and investigation program designed to assure compliance with the Act, is authorized by Section 8(a) of the Act, and is based upon injury rates experienced within certain designated industries." The magistrate was notified that "[c]onstruction industries . . . are designated high rate industries due to their high injury and fatality rates" and that OSHA's request for a full-scope warrant was justified under the relevant provisions of its administrative plan, which were attached as Exhibits B and D of the warrant application.

In particular, Wilkerson based this claim on the following provisions of the administrative plan, as set forth in section IX A.9. of the FOM:

9. Scope of Inspection. The scope of complaint inspec-tions shall be determined in accordance with guide-lines given in this section. . . .

   b. Construction and Longshoring Inspections. The inspection of a complaint in the construction and longshoring industry shall normally be a comprehensive inspection unless a substantially complete inspection of the worksite has been conducted within the last quarter. In that case the procedures in d. shall apply.

. . . .

> d. Low-hazard Industry Complaint Inspections. . . . [A] complaint inspection in a low-hazard industry shall generally be limited to working conditions identified in the complaint. If, however, the CSHO believes that the scope of the inspection should be expanded because of information indicating the likelihood of erious hazards in other portions of the plant . . . the supervisor shall be contacted. A decision will then be made on the basis of the information that is available whether the inspection is to be extended.[18]

3. Third-Party Consent. In paragraph 2 of his affidavit, Wilkerson informed the magistrate that OSHA had obtained third-party consent for the desired inspection of project 8.[19] Specifically, Wilkerson averred

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[18]On May 31, 1989, the Secretary filed in the district court an opposition to National's motion for a stay. (See discussion of National's motion, *infra*). In that opposition, the Secretary argued that her warrant application had provided probable cause for a full-scope inspection--regardless of whether that application was evaluated under the provisions of paragraph 9.b. or paragraph 9.d. above: "[T]he Application for Inspection Warrant provides sufficient neutral criteria for an expanded inspection in even a low-hazard industry because of the additional safety hazards observed such as improper use and storage of flammable gases, failure to remove welding rods from welding cable clips, and inadequate protection of workers from moving vehicular traffic." As indicated above, Wilkerson stated in paragraph 2 of the affidavit that these additional safety hazards had been observed during the course of the section 8(f)(1) inspection.

[19]Under well-established Fourth Amendment case law, "[c]onsent effective to validate a warrantless search may be given by a person other than the victim of the search." *Donovan v. A.A. Biero Constr. Co.*, 746 F.2d 894, 898 (D.C. Cir. 1984). Such "third-party consent" may be given by anyone having common authority over the premises or effects that the government agent wishes to search. *Id. See also United States v. Matlock*, 415 U.S. 164, 171 (1974). Furthermore, such third-party consent is valid to justify a warrantless inspection even when

that representatives of ODOT and of the FHWA had given their consent to an inspection of the entire project. This consent was obtained shortly after the representatives of Jurgensen, National, and Tri-State refused, on May 8, to permit the inspection to continue in the absence of a warrant. Wilkerson also implied that, due to federal funding of project 8, the contractors on the project were all bound by a contractual provision that allowed OSHA to inspect the project for compliance with OSHA regulations. Attached to the warrant application as Exhibit C was a copy of that contractual provision, which provided, as follows:

> When the United States Government pays all or any portion of the cost of a project, the Federal laws and the fules and regulations made pursuant to such laws must be observed by the Contractor, and the work shall be subject to the inspection of the appropriate Federal agency.

2. National's motion for a stay

Also on May 9, 1989, National instituted its own action in the district court by filing a Motion for Stay of Inspection. In this motion, National urged the court to "stay" OSHA from conducting an expanded, full-scope

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targeted party objects to the inspection, as Jurgensen, National, and Tri-State did in these cases. *See J.L. Foti Constr. Co. v. Donovan*, 786 F.2d 714, 716–17 (6th Cir. 1986). The third party, however, can only consent to inspection of the common areas and not to inspection of areas under the exclusive authority of the targeted party. *See, e.g., National Engg. & Contrac. Co. v. OSHA*, 928 F.2d 762, 766 (6th Cir. 1991) (quoting *A.A. Biero*, 746 F.2d at 901–02) ("While authority to consent to a search of a common area extends to most objects in plain view, it does not automatically extend to the interiors of every enclosed space within the area").

inspection of project 8. Both the Secretary's warrant application and National's motion for a stay were assigned to U.S. Magistrate Jack Sherman, Jr.

In its memorandum supporting the motion, National corroborated CO Wilkerson's statements that OSHA had received a complaint on May 4 concerning the inadequacy of traffic control measures on Fort Washington Way and had sent inspectors to the worksite to investigate the complaint and inspect the work area. National further informed the magistrate that OSHA had "substantially completed" its complaint inspection, but that it "now plans to inspect the entire work zone, which consists of a very broad area of refurbishing construction, and to review matters other than those involved in traffic control." The employer indicated that it had objected from the outset to the section 8(f)(1) complaint inspection and that it was now objecting to OSHA's attempt to expand the inspection.

National emphasized that it "had no responsibility" for the traffic control measures that were at issue in the complaint since the "procedures" were designed by the state, approved by the federal government, and implemented by Jurgensen, the general contractor. It acknowledged, however, that its employees were working behind the traffic control devices that were the subject of the complaint.

National also confirmed in its memorandum that "the Federal government along with the State of Ohio is funding this refurbishing work." It is therefore implicitly acknowledged that it was bound by the above-quoted

contractual provision that the Secretary attached to her warrant application. National contended, however, that OSHA was not the "appropriate Federal agency"to conduct inspections under that provision because "Ohio inspectors" were at the worksite "on a daily basis," at least in part for the purpose of reviewing safety matters. Thus, it concluded, the federal government was using the state of Ohio to enforce "the appropriate safety standards".

Finally, National corroborated Wilkerson's averment that OSHA had obtained third-party consent to the requested expanded inspection:

> [I]t appears that OSHA has attained the approval of the Federal Highway Administration . . . and the State of Ohio for its inspectors to enter the work zone. In this regard, it is relying on the jurisdiction that these agencies have over the actual highway as well as the contract which subjects the work to a federal inspection.

However, National contended that "this consent does not and cannot extend to conducting an inspection behond that permitted under the plain sight rules." *See supra* note 19. Therefore, in the event the magistrate did not issue the requested order prohibiting OSHA from expanding its inspection, the employer alternatively urged him to limit OSHA "to a plain sight inspection" of the remainder of project 8.

3. The warrant

The third key event that took place on May 8, 1989, was Magistrate Sherman's issuance of the full-scope administrative inspection warrant requested by OSHA.

The magistrate did not include any limitation on the scope of the authorized inspection, such as the "plain sight" limitation sought by National in its alternative argument. OSHA served the warrant the next day, and the second phase of the OSHA inspection was therefore conducted pursuant to the authority granted by the warrant.

Beginning with the filing of her opposition to National's motion for stay, *see supra* note 18, the Secretary has consistently asserted that Magistrate Sherman reviewed both her warrant application and National's stay motion before issuing the challenged warrant. Nevertheless, despite several opportunities to dispute the Secretary's claim, the Respondents have never taken issue with it. Neither has Magistrate Sherman, although he also had the opportunity to challenge the accuracy of the Secretary's statement. Under these circumstances, we accept as fact that the magistrate reviewed National's stay motion and supporting memorandum before issuing the challenged administrative inspection warrant.

B. Judge's Decision and Arguments of the Parties

In their post-hearing brief, the Respondents argued before the ALJ that OSHA had had [sic] no basis for even seeking a warrant to expand its inspection beyond the matter raised and the area described in the section 8(f)(1) complaint. In their view, OSHA's inspection was completed when the CO determined on Monday, May 8, that the hazard described in the complaint had been fully abated. The Respondents also emphasized that the complaint had been directed against Jurgensen and not

against either of them. Indeed, OSHA's investigation had revealed that National and Tri-State were not responsible for either designing or implementing the traffic control plan that was at the heart of the problem.

In his decision, the judge considered and rejected the Respondents' position. He implicitly concluded that the Secretary, in her warrant application, had established "administrative probable cause" for a full-scope inspection under either or both of the alternative tests set forth in *Barlow's*–the "specific evidence test" and the "administrative plan test." Specifically, the judge found that "[t]he warrant application herein was based not only on the plain view observation of the Compliance Officer of alleged violations . . . but [also] on a detailed explanation of the general inspection plan OSHA utilizes which is based on neutral criteria." The judge concluded that "there was valid reason for the issuance of the warrant, and [therefore] there is no basis for suppression of the evidence" gathered under the warrant.

On review, the Respondents restate the arguments that they made before the ALJ. In addition, they argue that there was "no basis for citing Tri-State for the conditions alleged in the complaint," as demonstrated by (1) the judge's decision to vacate the only citation issued as a result of the section 8(f)(1) investigation, *see supra* note 12, and (2) CO Cannon's opinion testimony that neither 29 C.F.R. § 1926.201 nor 29 C.F.R. § 1926.202, *see supra* note 8, applied to the conditions described in that citation.[20] They further note that it was the general

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[20]As set forth *supra* at note 12, OSHA issued a citation to Tri-State alleging a willful violation of section 5(a)(1) of the Act, based on the conditions it discovered during its section 8(f)(1) complaint inspection. When the Secretary

contractor, and not the Respondents, who eventually abated the hazard described in the section 8(f)(1) complaint.

The Secretary on review argues that the judge was correct in concluding that the warrant issued on May 9, 1989, was valid. She focuses, however, on a number of alternative arguments that assertedly make it unnecessary for us to rule on the validity of the warrant.[21]

C. Analysis

We conclude that the evidence gathered by OSHAduring the second phase of its inspection of project 8 was gathered pursuant to a valid administrative

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filed her complaint in OSHRC Docket No. 89-2611, however, she amended the citation in question to allege that Tri-State committed a serious violation of either § 1926.201 or § 1926.202. (This amendment changed only the Secretary's legal theory and not the factual basis of the charge; the citation was still directed essentially to Tri-State's failure to keep motorists out of the work area on Fort Washington Way). In his decision in these consolidated cases, the ALJ vacated this contested citation, at least in part because of CO Cannon's opinion testimony that neither of the two standards cited in the amended charge applied to the cited conditions. (The judge also found that the Secretary had failed to prove noncompliance with either of the standards, assuming that they were applicable). The judge expressed no opinion as to whether the cited conditions violated section 5(a)(1), as the Secretary had originally charged.

[21]In view of our conclusion, *infra*, that the judge was correct in holding that the warrant was valid, we need not reach the other arguments raised by the Secretary in her review brief. We note, however, the inconsistency between (a) the Secretary's claim before us that the inspection at ussue could have been conducted without a warrant and (b) the concession made by the Secretary before Magistrate Sherman that a warrant was necessary, even though she had already obtained third-party consent, because she intended to conduct (and indeed later did conduct) an inspection that went well beyond those conditions that were in "plain sight." *See supra* note 19.

inspection warrant, specifically, the warrant issued by Magistrate Sherman on May 9, 1989. The warrant was valid because OSHA's warrant application established administrative probable cause for a full-scope inspection under the *Barlow's* "specific evidence test."

As detailed in Part II A of this decision, *supra*, the warrant application filed with the district court was a hybrid application; that is, OSHA attempted to establish administrative probable cause for a full-scope inspection under either or both of the two alternative tests set forth in *Barlow's*. Thus, the application provided the magistrate with "specific evidence" of violations discovered during the course of the section 8(f)(1) inspection. It also presented him with OSHA's claim that a full-scope inspection was authorized under a general administrative plan for enforcement of the Act, along with the facts that OSHA relied upon in selecting project 8 for a full-scope inspection under the terms of that plan. In addition, CO Wilkerson informed the magistrate of other matters–such as the contractual provision authorizing inspections by "appropriate" federal authorities and OSHA's obtaining of third-party consent to the expanded inspection–that were clearly relevant to the issues pending before the magistrate, but that did not fall neatly into either of the two *Barlow's* tests.

Because of the hybrid nature of this warrant application, we conclude that the cases now before us are analogous to two other cases in which federal appellate courts have upheld full-scope administrative inspection warrants that were issued in response to similar warrant applications. *In re Cerro Copper Prods.*, 752 F.2d 280 (7th Cir. 1985); *In re Inspection of Workplace (Carondelet Coke Corp.)*, 741 F.2d 172 (8th Cir. 1984). In both *Cerro Copper*

and *Carondelet Coke*, the Secretary argued that a full-scope inspection was justified under the terms of a "general administrative plan for the enforcement of the Act derived from neutral sources" within the meaning of *Barlow's*. However, in neither of these cases did the Secretary rely solely on her administrative plan. Instead, in both *Cerro Copper* and *Carondelet Coke*, the Secretary provided the magistrate with supplemental evidence to strengthen her claim that a full-scope inspection should be authorized.

Following the Secretary's lead, the courts in both of these cases examined the warrant applications under the *Barlow's* "specific evidence test" rather than the Court's "administrative plan test." Accordingly, the courts in both cases concluded that, *under the specific facts of the cases then before them*, a "wall-to-wall inspection" would not be unreasonable and therefore would not be in violation of the Fourth Amendment. *See Cerro Copper*, 752 F.2d at 283; *Carondelet Coke*, 741 F.2d at 177. Although the factors favoring a full-scope inspection in the cases now before us are different from the factors that were considered by the Seventh and Eighth Circuits, we reach the same conclusion that those courts reached. We conclude that *the combination of factors* set forth in the warrant application filed by OSHA on May 9, 1989, established administrative probable cause for a full-scope inspection under the "specific evidence test."

Chief among those factors, in our view, was the third-party consent given by the project administrator (ODOT) and the FHWA for a full-scope inspection of project 8. This consent was particularly significant here because (1)

the contractors were contractually obligated to comply with pertinent Federal laws, rules, and regulations, and (2) they had contractually subjected themselves to the possibility that these obligations might be enforced, through workplace inspections, by "the appropriate Federal agency." The third-party consent that was given here was given to OSHA, the federal agency with statutory authority to enforce workplace safety and health standards. In all likelihood, this was precisely the kind of inspection that was anticipated when this contractual provision was drafted and included in the governing contracts.

In any event, as the Respondents themselves conceded in their arguments before Magistrate Sherman, this third-party consent was sufficient, even in the absence of the warrant or even in the absence of the contractual provision, to authorize an OSHA inspection of all of the work areas in project 8 that were in "plain sight" of the OSHA inspectors. On the record created before us, we conclude that most of the inspected workplace (project 8) was in "plain sight" since the contractors were performing their work primarily, if not exclusively, on elevated bridges and highways.

Nevertheless, as the Secretary conceded in her arguments before the magistrate, a warrant was necessary because OSHA did not intend to limit, and subsequently did not limit, her expanded inspection to a viewing of conditions that were in plain sight. For example, several of the contested citation items at issue in both Docket No. 89-2611 and Docket No. 89-2705 were based on information that CO Cannon obtained as a result of his exhaustive examination of records and documents (*e.g.*,

material safety data sheets) that were maintained by National and Tri-State in their office trailer.

OSHA therefore supplemented its showing of administrative probable cause by also establishing that a full-scope inspection was called for under the provisions of a general administrative plan for the enforcement of the Act.[22] Indeed, as the Secretary pointed out to the magistrate, *see supra* note 18, a full-scope inspection would have been justified even if the Respondents had been part of a "low-hazard industry." Under the terms of the Secretary's then-effective administrative plan, a section 8(f)(1) complaint inspection in a low-hazard industry could be expanded to cover the entire worksite if the complaint inspection led to "information indicating the likelihood of serious hazards in other portions of the [workplace]."

Here, we conclude that OSHA's three-day complaint inspection and investigation provided it with ample reason to believe that it was likely to discover other serious hazards in other project 8 work areas. To begin with, the investigating CO's determined almost immediately that the section 8(f)(1) complaint was meritorious. Indeed, CO Cannon believed that the conditions described in the complaint and confirmed by his inspection and investigation constituted not only a

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[22]In her review brief, the Secretary noted that "the administrative plan which formed the primary basis for seeking a full scope warrant has been changed" since the filing of the warrant application at issue in these cases. In particular, the provision governing the expansion of complaint inspections in the construction industry has been revised.

serious violation of section 5(a)(1) of the Act, but also an imminent danger to the exposed employees. In addition, his investigation disclosed that the employees had been repeatedly exposed to this imminent danger for a week prior to OSHA's arrival on the scene, despite the fact that the hazard was recognized as such by everyone involved from the first day that it arose. Also, it took several more days after OSHA's arrival before abatement was finally accomplished. Finally, although the work area inspected during the section 8(f)(1) investigation was relatively small, OSHA observed other serious hazards in addition to the imminent danger.

Therefore, even if the section 8(f)(1) inspection had been conducted in a "low-hazard industry," the limited inspection would have provided OSHA with sufficient grounds to justify an expansion of the inspection to the entire workplace. Here, however, the inspection was *not* in a low-hazard industry. Instead, the workplace as a large, multi-employer construction project. Accordingly, CO Wilkerson informed the magistrate that construction industries are "high rate industries due to their high injury and fatality rates" and that OSHA's then-effective administrative plan provided that section 8(f)(1) inspections of such construction worksites "normally" would be "comprehensive" or full-scope inspections of the entire worksite.

In their arguments on review, the Respondents do not directly attack the sufficiency of the Secretary's probable cause showing. Instead, they argue that the Secretary acted in bad faith in seeking an expanded inspection and suggest that, if the magistrate had been given an accurate description of OSHA's section 8(f)(1) inspection, he would have concluded that no warrant at all was justified,

let alone a warrant authorizing a comprehensive inspection of the entire workplace.

We disagree. The matters deemed critical by the Respondents do not undercut the Secretary's showing of administrative probable cause for a full-scope inspection. For example, the Respondents emphasize that the hazard described in the employee representative's complaint was fully abated to OSHA's satisfaction *before* OSHA went into the district court to obtain an administrative inspection warrant. We conclude, however, that this fact is not as significant as the fact that it took over a week–despite employee and union complaints, "near miss" incidents, and pressure from OSHA–to attain abatement of this imminent danger hazard.

The Respondents also stress the issue of responsibility for the traffic control hazard, including the question of who had the ability to abate. However, these matters were essentially irrelevant to the magistrate in determining whether to grant OSHA's request for authority to conduct a full-scope inspection of project 8. The warrant sought and obtained by OSHA in no way targeted National or Tri-State or any other particular contractor working on the project. The relevant fact from the viewpoint of OSHA in seeking the warrant and the magistrate in issuing the warrant was the fact that workers were exposed to hazards that appeared to be in violation of the Act, not the fact that any particular contractor or

governmental entity was "responsible" for the exposure or for abatement of the hazard.[23]

Finally, the Respondents point to the "fact" that OSHA had "no basis for citing Tri-State for the conditions alleged in the complaint." This argument, however, misstates the record in several important respects. For example, the Respondents emphasize the "concession" of CO Cannon that neither § 1926.201 nor § 1926.202 applied to the cited working conditions, but they ignore the fact that the citation issued to Tri-State did not allege a violation of either of these two standards. Instead, the citation issued following OSHA's section 8(f)(1) inspection and investigation alleged that Tri State violated section 5(a)(1) of the Act. *See supra* note 12. Thus, except for the allegation of willfulness, the Secretary's *original* charge was fully consistent with the investigating compliance officer's views of the case, *i.e.*, that Tri-State's employees were exposed to an imminent danger, that these employees were exposed to conditions in violation of the Act's general duty clause, and that §§ 1926.201 and 1926.202 were not applicable to the conditions that he observed. Furthermore, the ALJ's decision does not conflict with CO Cannon's views. The judge expressed no opinion as the validity of the Secretary's original charge,

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[23] In any event, the Respondents discuss only the question of contractual responsibility, ignoring the more significant issue of legal responsibility under the Act. Thus, for example, the duty imposed by section 5(a)(1) of the Act, *see supra* note 8, to protect workers from recognized hazards that are causing or likely to cause death or serious physical harm, is a duty statutorily imposed on each employer with respect to its own employees. The fact that others had the contractual responsibility for developing and implementing the traffic control plan did not mean that National and Tri-State were powerless to protect their own employees or that they were absolved of all responsibility under the Act to provide those employees with safe and healthful workplaces and working conditions.

holding only that the Secretary had failed to prove noncompliance with the specific provisions of the two OSHA standards cited in her amended charge.

Contrary to the arguments of the Respondents, OSHA had ample reason on May 8 and 9, 1989, for seeking to e:- . nd the scope of its inspection warrant. Since OSHA's warrant application supplied the magistrate with administrative probable cause to support the issuance of such a warrant under the *Barlow's* "specific evidence test," the warrant issued by Magistrate Sherman was valid, and the evidence gathered pursuant to that warrant cannot be suppressed on Fourth Amendment grounds.

III. THE CHALLENGE TO THE WILKERSON AFFIDAVIT

A. Background

Tri-State and National raised their Fourth Amendment defense before the Commission when they filed their answers, in Docket Nos. 89-2611 and 89-2705, respectively. After these cases were consolidated by order of the ALJ, on December 28, 1989, the Respondents wought to follow up on their defense by conducting discovery depositions of CO Cannon, Area Director Murphy, and CO Wilkerson. The Secretary consented to the taking of the Cannon and Murphy depositions, but refused to allow the deposition of CO Wilkerson. Thus, for example, in a February 8, 1990 letter, the Secretary's counsel responded to a request from the Respondents' counsel, as follows:

> We will object to the taking of Mrs. William J. Wilkerson's deposition because his only involvement in the cases related to the application for the warrant. An evidentiary hearing on a warrant can only be conducted under *Franks v. Delaware*, 438 U.S. 154, 171–172 (1978), upon a "substantial preliminary showing" that the warrant application contains false statements that are made knowingly and intentionally, or made with a reckless disregard for the truth. Respondents have made no showing in the subject cases and are therefore not entitled to discovery or an evidentiary hearing on warrant issues.

The reference in the Secretary's letter is to the following passage from the decision of the United States Supreme Court in the *Franks* case:

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. . . . Allegations of negligence or innocent mistake are insufficient. . . . Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or deliberate disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.

438 U.S. at 171.

On March 13, 1990, the Respondents began taking the deposition of CO Cannon. (The two-day deposition was finished on May 15, 1990.) On April 10, 1990, the Respondent's counsel again wrote to the Secretary's counsel requesting an opportunity to take the deposition of CO Wilkerson. Citing the *Franks* case, the Respondents in effect asserted that they were able to make the "substantial preliminary showing" required under that decision.

> From the information which has been developed during Mr. Cannon's deposition, it appears clear that the Warrant Application signed by Mr. Wilkinson (sic) contained false statements in a number of important respects. Accordingly, National Engineering and Tri-State are entitled to probe the basis for his statements in that application.

When the Secretary again refused to consent to the deposition, the Respondent's filed a motion with the ALJ to compel this discovery. Following through on their stated intention, the Respondents based their preliminary showing under *Franks* on alleged inconsistencies between CO Cannon's deposition testimony and the statements of CO Wilkerson in his warrant application affidavit. The Secretary opposed the motion, arguing that the Respondents had not met their burden under *Franks*.

On July 13, 1990, the judge issued his order denying the Respondent's motion to take the deposition of CO

Wilkerson. He held that the Respondents had not met their burden of proof under *Franks* because "[n]o substantial preliminary showing was made that a false statement was intentionally or recklessly made by Wilkerson and that such false statement was necessary to the finding of probable cause."

B. Anlaysis

We conclude that the judge correctly decided this issue. Under *Franks*, the Respondents had the burden of proving that the warrant affidavit included (1) false statements (2) that were knowingly or intentionally made or made with reckless disregard for the truth and (3) that were necessary to the magistrate's finding of administrative probable cause. For the reasons that follow, we hold that non of the statements by Wilkerson that the Respondents have challenged meet all three of these tests. We therefore agree with the judge that the Respondent's failed to make the "substantial preliminary showing" that would have entitled them to conduct discovery into the underlying basis, the acccuracy, or the completeness of the warrant affidavit.

The first challenged statement in the warrant affidavit relates to the events of May 4, 1989, the first day of OSHA's section 8(f)(1) inspection: "After conducting an opening conference with the general contractor on the project the formal walkaround commenced." The Respondents assert that this statement is "untrue" because "[t]he opening conference did not occur until Monday, May 8, 1989, and the walk-around inspection did not occur until the following day, Tuesday, May 9,1989."

The discrepancy in the dates is easily explained by pointing out that the inspection at issue occurred in two phases: the warrantless first phase that was limited to the area described in the section 8(f)(1) complaint and the expanded second phase that was conducted pursuant to the warrant and that included all of project 8. Wilkerson's statement in the affidavit refers to the first phase of the inspection, while the Respondents' assertions relate, albeit inaccurately, to the second phase.[24]

However, even after this confusion is cleared up, it is still evident, as the Secretary has conceded, that the challenged statement in the warrant is inaccurate. While CO Cannon met with representatives of the general contractor on May 4–both at the work area described in the section 8(f)(1) complaint and in Jurgensen's office trailer after he left the work area–his abbreviated opening conference was with representatives of National and Tri-State rather than representatives of Jurgensen. Moreover, it is probably stretching the facts to describe the events of May 4 as a "formal walkaround." See Part IA, *supra*.

Nevertheless, we agree with the Secretary that the inaccuracies in this quoted affidavit statement are more likely the result of confusion over which employer was

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[24]As set forth more fully in Part IA of this d ecision, *supra*, OSHA made the decision to expand its inspection on Monday, May 8, and thereafter attempted to gather all of the contractors on project 8 for an opening conference. However, these efforts fell apart when representatives of Jurgensen and National/Tri-State demanded that OSHA obtain an administrative inspection warrant. This warrant was obtained on May 9 and served on May 10, which was the day the formal walkaround inspection began.

involved in the section 8(f)(1) complaint than an indication of a deliberate attempt to present false evidence or of a reckless disregard for the truth. The employee representative's complaint was directed against Jurgensen, the general contractor. However, when the CO's arrived, they discovered that only employees of Tri-State were exposed to the imminent danger hazard described in the complaint. It was for this reason that the abbreviated opening conference was held with representatives of Tri-State and National rather than representatives of Jurgensen.

In any event, even if we were to conclude that the misstatement was deliberate, we have no difficulty in further concluding that it does *not* meet the third part of the *Franks* test, *i.e.*, it was not a statement that was necessary to the magistrate's determination of administrative probable cause. On the contrary, as we noted previously, the question of which employer was responsible for the hazardous conditions described in the employee representative's complaint was essentially irrelevant to the magistrate's determination of administrative probable cause because the Secretary was weeking authorization for an inspection that would cover all contractors working on project 8, without regard to their responsibility for the imminent danger hazard. It therefore follows that such matters as which contractors OSHA held its opening conference with and when it began its formal walkaround inspection were equally irrelevant to the magistrate.

The second challenged statement in the warrant affidavit is the statement we have quoted in Part IIA1 of this decision, *supra*, concerning the hazards observed by OSHA during its limited section 8(f)(1) inspection. Part

of the Respondents' reasoning can be easily dismissed since the argument makes no sense. The Respondents claim that CO Cannon's deposition testimony establishes that he did not observe the "additional safety hazards" referred to in the warrant affidavit–"improper use and storage of flammable gases, failure to remove welding rods from welding cable clips, [and] inadequate protection of workers from moving vehicular traffic"–during the first phase of the inspection, as alleged in the affidavit. Rather, these conditions were not observed until the second phase of the inspection.[25] However, the Respondents offer no explanation as to how the warrant affidavit, which was filed on May 9, 1989, could have included a description of conditions that were not observed until the second phase of the inspection, which began on May 10. This matter is cleared up by a closer reading of the deposition testimony that the Respondents rely upon. That testimony does not relate at all to the hazards described in the warrant affidavit, but rather to the hazards described in certain contested citation items that were based on the CO's observations during the second phase of the inspection.

The more serious charge by the Respondents concerning the challenged statement is the claim that the magistrate was misled by material omissions from the

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[25]Specifically, the Respondents argue as follows in their review brief:

> These observations [of "additional safety hazards," as described in the affidavit] could only have been made by the compliance officer on the scene. However, he testified [in his deposition] that these observations only occurred after May 9, not before.

affidavit, specifically, Wilkerson's alleged failure to inform the magistrate "that the condition for which [OSHA] was summoned to the worksite had already been completely examined [and abated] and that it now wished to expand its inspection beyond the contours of that matter." At the outset, we find that there was no intent on Wilkerson's part to deceive the magistrate on these matters. Thus, the affidavit forthrightly stated that "[t]he walkaround inspection, which included the hazards described in the complaint, has resulted in the identification of an imminent danger safety hazard *and the immediate abatement of same* " (emphasis added). It is unfortunate that the affidavit was not more clear in apprising the magistrate that the hazard described in the complaint and the imminent danger situation observed by the CO were the same hazard. But the inclusion of the above-quoted statement in the affidavit precludes us from finding any intentional misrepresen-tations or reckless disregard for the truth on the part of Wilkerson. Similarly, while the affidavit might have been more clear in informing the magistrate that the inspection of the area described in the employee representative's complaint had basically been completed and that OSHA's intent was therefore to seek a geographic expansion of its inspection, we cannot conclude that the affidavit was misleading with respect to these matters. On the contrary, the most logical inference to be drawn from the information that was provided to the magistrate was that OSHA was seeking to expand its inspection because it had already completed its 8(f)(1) investigation.

In any event, whatever deficiencies there may have been in the Secretary's warrant application were more than adequately compensated for in National's motion for stay of the inspection. As we have detailed in Part IIA2 of

this decision, *supra*, Nationals' motion fully informed the magistrate of all those matters it emphasizes in its argument before us–the completion of the section 8(f)(1) inspection, abatement of the hazard described in the complaint, and the Secretary's intent to expand the scope of the inspection. Since the magistrate read and considered National's motion before issuing the warrant in question, we cannot conclude that the alleged omissions in the warrant application had any effect on his determination of administrative probable cause.

The Respondents' next argument borders on the frivolous. They challenge Wilkerson's statement that CO Cannon returned to the Fort Washington Way work area on May 5 and 8, 1989, "to continue [his] walkaround." On this record, it is undisputed that Cannon did return to this work area on both May 5 and 8 to continue his investigation of the section 8(f)(1) complaint and as part of his ongoing effort to obtain abatement of the hazard. Whether or not these worksite visits were technically part of the CO's "walkaround" was totally irrelevant to the magistrate's determination of administrative probable cause.

The Respondent's next challenge is more substantive, although we conclude it also is without merit. The Respondents attack Wilkerson's statement that CO Cannon was "informed on May 8th by representatives of . . . [Jurgensen, National and Tri-State] that the inspection would not be permitted to continue and an inspection warrant would be required." At the outset, we observe that this challenged statement is a true statement. Nevertheless, the Respondents correctly point out that,

when taken in context, the statement could be construed as a false claim that the objections raised on May 8 were the first objections to the OSHA inspection. The affidavit makes no mention of prior objections, although the record establishes that the Respondents' counsel had demanded a warrant on May 4, approximately an hour after OSHA first arrived at the worksite.

Here again, however, we cannot conclude that the magistrate's determination of administrative probable cause was affected by the omission of this information from the warrant affidavit. National's motion, which was considered by the magistrate before he issued the warrant, clearly informed him that National had objected to the limited section 8(f)(1) inspection as well as to OSHA's attempt to expand the inspection beyond the limits of the area described in the employee representative's complaint.

Finally the Respondents challenge the statement in Wilkerson's affidavit concerning OSHA's determination that the employee representative's complaint described conditions in violation of the Act. *See supra* note 8. The Respondents challenge this statement on the basis of CO Cannon's deposition testimony that, in his opinion, the conditions he observed at the workplace were not in violation of either 29 C.F.R. § 1926.201 or 29 C.F.R. § 1926.202 because neither of those standards applied.

This challenge also fails to meet the *Franks* test. Indeed, the Respondents have failed to make the threshold showing that the statement is false. They ignore the fact that the statement is expressed as Wilkerson's personal opinion: *"In my opinion as an experienced safety and health investigator*, the complaint

alleges serious conditions that are covered by 29 CFR 1926.201, 29 CFR 1926.202, Section 5(a)(1) of the Act and other parts" (emphasis added). Such a statement cannot be contradicted by CO Cannon's testimony as to his personal opinion, which may have been different from Wilkerson's. At most, therefore, the Respondents have shown a difference of opinion between two OSHA compliance officers over the applicability of two OSHA standards.[26]

For the reasons stated above, we conclude that none of the statements in Wilkerson's affidavit that have been challenged by the Respondents meets the three-part test we set forth above: (1) a false statement (2) that was knowingly or intentionally made or made with reckless disregard for the truth and (3) that was necessary to the magistrate's finding of administrative probable cause. We therefore affirm the judge's ruling denying the Respondent's motion to take the deposition of CO

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[26]Even if the challenged statement is viewed as being OSHA's determination rather than Wilkerson's personal opinion, we cannot conclude that the asserted misrepresenetation had any effect on the magistrate's determination of administrative probable cause. In effect, the challenged statement presented the magistrate with each of the alternative theories that the Secretary later advicated in the proceedings before the Commission, that is, that the conditions described in the employee representative's complaint and confirmed by Cannon's workplace inspection were in violation of § 1926.201 *or* § 1926.202 *or* section 5(a)(1) of the Act. Assuming that there was disagreement within OSHA over which of these legal requirements covered the hazard at issue, we conclude that OSHA had no obligation to bring this disagreement to the magistrate's attention. From the viewpoint of the magistrate in making his probable cause determination, the significant fact was that insofar as this record shows, everyone in OSHA involved in the inspection and warrant application process agreed that the hazard in question violated *the Act.*

Wilkerson on the ground that the Respondents failed to make the "substantial preliminary showing" required under *Franks v. Delaware.*

IV. THE ALLEGED VIOLATION OF 29 C.F.R. §§ 1926.500(d)(1)

The final issue before us on review concerns the merits of a contested citation item in Docket No. 89-2705. Citation no. 1, item 9, in that case alleges that the Respondent National violated 29 C.F.R. § 1926.500(d)(1) at three separate locations within the scope of project 8. In h is decision, the ALJ affirmed this item as a serious violation of the Act and assessed a penalty of $350. However, for the reasons stated herein, we conclude that the cited standard does not apply to the cited conditions. We therefore reverse the judge and vacate the citation item.

The three incidents identified in the record as the basis of this alleged violation each involve employees of National who were working near the edges of bridges or ramps that were used as interchanges between interstate highways. In each instance, the employees were working within a few feet of the edge of the bridge. Only a 20- to 29-inch-high concrete wall or "parapet" stood between the employees and a fall of 15 or 20 feet to the city streets below. Also in each instance, the work being performed by the employees related to the "recontouring" of the parapet walls.

Prior to National's arrival at the worksite, the bridges or ramps in question had protective barriers on each side of them. These barriers consisted of an 8-inch-high

sidewalk or curb, which was adjacent to a 21-inch-high parapet wall, which in turn was topped by 12-inch-high pipe railing. (Thus, the railing was 41 inches above the surface of the roadway). Part of National's responsibility under its contract with Jurgensen was to reconstruct these protective barriers. This involved removal of the pipe railing, removal of the sidewalk or curb, and finally building up the concret wall to a height of 42 inches. The "old" parapet was not destroyed in this process, but rather remained in place as a protective barrier throughout.

At the time of the alleged violation, the pipe railing had been removed in each of the cited locations, and the sidewalk or curb had been partially removed. Thus, depending on whether an employee was standing on the roadway or on the sidewalk/curb, he or she was working next to a concrete parapet that was either 29 or 21 inches high. In one instance, an employee was actually standing on the parapet wall drilling holes into it (apparently for reinforcing bars, in preparation for the pouring of concrete). However, that employee was protected by a safety belt. None of the other employees observed by the CO was similarly protected.

The cited standard is contained in Subpart M–Floor and Wall Openings, of Part 1926. It provides, as follows:

> **§ 1926.500 Guardrails, handrails, and covers.**
>
> . . . .
>
> (d) *Guarding of open-sided floors, platforms, and runways.* (1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing or the

> equivalent, as specified in paragraph (f)(1)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.

In his testimony concerning item 9, CO Cannon suggested two possible means of elimination the cited fall hazard. First, he pointed out a device shown in one of the photographic exhibits. The device, which appears to be a sheet of plywood attached to the parapet wall, has the effect of extending the parapet wall to a height well above the employees' head level. Cannon identified the purpose of the device as the prevention of chips falling over the edge of the bridge onto the city streets below. However, he claimed that it could also serve the same function as a guardrail in protecting workers against falls. The CO's other suggested abatement method was the use of safety belts and lifelines. He did not even suggest, however, that standard guardrails or their equivalent–the method of abatement specified in the cited standard–could have been used to protect the employees at issue.

On review, National presents two arguements against the judge's decision to affirm this citation item:

> First, the standard itself is not applicable to this situation. The interstate highway, with its existing parapet wall, was not an open-sided floor or platform . . . . Alternatively, even were this work area considered an open-sided floor or platform, the existing and, thereafter, reconstituted concrete

> parapet wall served the purpose of an equivalent guard to prevent a fall hazard. . . . [Since] the purpose of the standard was met . . . . this citation should have been vacated.

Because we agree with the first of these two arguments, we find in unnecessary to reach the second.

Specifically, we agree with National that the paved interstate highway ramps or bridges with 29-inch-high concrete parapet walls on each side of them were not "open-sided floors" within the meaning of the cited standard. We therefore vacate citation no. 1, item 9 on the ground that the cited standard does not apply to the cited working conditions. In so ruling, we reply upon the plain meaning of the standard's terms.

In other cases arising under this same standard, federal appellate courts have reminded the Commission of our responsibility to interpret and apply OSHA standards in accordance iwth the plain meaning of their terms. In particular, in those cases, the courts held that it was error for the Commission to apply section 1926.500(d)(1) to open-sided *roofs* becase a roof is not a "floor." *Diamond Roofing Co. v. OSHRC,* 528 F.2d 645 (5th Cir. 1976); *Langer Roofing & Sheet Metal, Inc. v. Secretary,* 524 F.2d 1337 (7th Cir. 1975). Applying this same reasoning inthe case now before us, we conclude that a paved interstate highway with concrete parapet walls on each side of it similarly cannot be characterized as an "open-sided floor."

The Secretary responds to this reasonaing by pointing to the Commission's decision in *Pace Constr. Corp.* 14 BNA OSHC 2216, 1991 CCH OSHD ¶ 29,333 (No. 86-758, 1991). In that case, we concluded that employees working on a balcony of a multi-storied building that was still under construction were working on an "open-sided floor" within the meaning of § 1926.500(d)(1), the same standard that is at issue here. In reaching this conclusion, we relied upon dictionary definitions that specifically included the "floor of a bridge" within the meaning of the term "floor." *Id.*, 14 BNA OSHC at 222, 1991 CCH OSHD at p. 39,431. We did not intend to suggest, however, that the term "floor" as used in § 1926.500(d)(1) includes the surface of a bridge that is covered by a paved interstate highway. Nor is it likely that the sources we relied upon intended such a result. In any event, even if we could get over this hurdle to acceptance of the Secretary's position, we could not conclude that the roadways at issue were "open-sided" within the meaning of the standard.

The Secretary would have us disregard the fact that the workers in question were all times working next to concrete walls that were either 29 or 21 inches above the surfaces on which they were standing. She seeks to draw an analogy between this situation and other cases in which the Commission held in effect that a trenching contractor could not escape coverage under the then-effective trenching regulations by improperly sloping a trench: "[The argument that the working surfaces at issue were not 'open-sided' because they were bordered by parapet walls] makes no more sense than the argument, consistently rejected by the Commission, that under the former trenching standard, a trench's width was measured at its top, the result being that as a trench was sloped back

to comply with the standard, it would likely become wider than deep and thus cease being subject to that standard."

This analogy is not persuasive. The situation before us is not one in which an employer has installed an inadequate, 29-inch-high barrier and then attempted to argue that the Secretary cannon cite § 1926.500(d)(1) because the "floor" is no longer "open-sided." Instead, when National arrived at the worksite, it found a fully-completed section of interstate highway, next to which a sidewalk or curb with adjacent parapet and guardrails had been installed. National's contractual responsibility included "rehabilitating" this old barrier so that, in its "recontoured" form, the concrete wall itself would be 42 inches high and the old pipe railing guardrails would no longer be necessary.

As indicated, OSHA has not even attempted to eshablish that National could have protected its employees during this construction process by putting up, on the sides of the bridges, "a standard railing or the equivalent" within the meaning of § 1926.500(d)(1). Instead, it has relied solely on other possible measures that might have been taken to protect the employees. In our view, this failure to even mention the installation of standard guardrails as an abatement methon provides further support for National's contention, and our conclusion, that the Secretary is attempting to enforce this standard in a situation it was never intending or designed to cover. *Cf. Spancrete Northeast, Inc. v. OSHRC*, 905 F.2d 589 (2d Cir. 1990) (court concludes ALJ erred in affirming alleged violation of § 1926.500(d)(1) based on employer's failure to provide safety belts).

V. ORDER

For the reasons stated, we affirm the judge's rulings on the Fourth Amendment issues that are before us. Specifically, we affirm his rejection of the Respondent's Fourth Amendment defense on the ground that neither the warrantless first phase of the OSHA inspection nor the expanded second phase, which was conducted pursuant to a valid warrant, violated the Respondents' Fourth Amendment rights. We also affirm the judge's denial of the Respondents' motion to take the deposition of CO Wilkerson. We reverse, however, the judge's conclusion that the Respondent National violated 29 C.F.R. § 1926.500(d)(1). We vacate citation No. 1, item 9, in Docket No. 89-2705.

Edwin G. Foulke, Jr. /s/
Chairman

Donald G. Wiseman /s/
Commissioner

Velma Montoya /s/
Commissioner

Dated: September 30, 1992

APPENDIX E

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

LYNN MARTIN, SECRETARY OF LABOR Complainant,	:	
v.	:	
TRI-STATE STEEL CONTRUCTION, INC. Respondent,	:	Docket No. 89-2611
AND	:	
NATIONAL ENGINEERING & CONTRACTING CO. Respondent.	:	Docket No. 89-2705 (Consolidated)

APPEARANCES: JANICE L. THOMPSON, ESQUIRE
U.S. Department of Labor
Cleveland, Ohio
For the Complainant,

KENT W. SEIFRIED, ESQUIRE
Holbrook & Poston
Cincinnati, Ohio
For the Respondent.

DECISION AND ORDER

SOMMER, JUDGE:

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*, hereafter called the "Act"). Respondents Tri-State Steel Corporation, Inc. (Tri-State), and National Engineering & Contracting Company (National), were engaged in bridge reconstruction work let by the Ohio Department of Transportation on Interstates 74 and 75 and Fort Washington Way in Cincinnati, Ohio. These cases were docketed under Commission Docket Nos. 89-2611 (TTri-State and 89-2705 (National). The two cases were consolidated for purposes of trial. Hearings were held in Cincinnati, Ohio, from August 14-16, 1990. Both parties were represented by counsel who filed post-hearing briefs.

Tri-State was issued a serious citation containing six items and a willful citation containing one item. Prior to the hearing the Secretary amended the willful violation, 5(a)(1), to a serious violation and alleged a violation of 29 C.F.R. § 1926.202(a)(1) or, in the alternative 29 C.F.R. § 1926.202. Item two of the serious citation was amended at the hearing to allege a violation of 29 C.F.R. § 1926.59(f)(5)(ii) instead of 29 C.F.R. § 1200 (f)(5)(ii).

National was issued a serious citation containing ten items, a willful citation containing one item, and an "other than serious" citation containing one item. Prior to the hearing the Secretary amended the willful violation, 5(a)(1), in citation No. 2 to a serious violation of 29 C.F.R. 201(a)(1) or, in the alterative 29 C.F.R. § 1926.202. In both the National and Tri- State cases the penalties for the

violation amended from willful to serious were reduced from $9,000 to $1,000. At the hearing, the Secretary amended National citation No. 1 by withdrawing item 4(a), and by modifying item 8 from a violation of 29 C.F.R. § 1926.152(d)(2) to a violation of 29 C.F.R. § 1926.152(g)(11).

BACKGROUND

Respondents National Engineering & Contracting Company and Tri-State Steel Construction, Inc. are Ohio Corporations engaged in the construction business. Tri-State is a subsidiary of National. (T-595) Both Respondents were subcontractors engaged in bridge reconstruction work on Ft. Washington Way in downtown Cincinnati. The John R. Jurgensen Company was the prime contractor on this job which was let by the Department of Transportation of the State of Ohio (ODOT). Pursuant to a Complaint filed (with the Cincinnati area office of OSHA), alleging hazardous conditions arising from vehicular traffic, compliance officer Cannon proceeded to the worksite on May 4, 1989, to make an inspection. His presence without a warrant was objected to by Respondent. During May 4-6, 1989, he spent some time in this area observing traffic conditions. On May 9, 1989, OSHA obtained a warrant for inspection of the entire working area. As a result of the inspection, both National and Tri-State were issued serious citations which are involved here (one other than serious citation with no penalty was issued against National). A serious violation exits (sic) when "there is a substantial probability that death or serious physical harm could result" from the violation. 29 U.S.C. § 666(k)(1982).

VALIDITY OF THE INSPECTION - VALIDITY OF WARRANT OBTAINED - SUPPRESSION OF EVIDENCE

Respondents National and Tri-State were subcontractors on a bridge reconstruction job located in downtown Cincinnati. In response to a complaint that there was a hazard present due to vehicular traffic crossing through the work area located on westbound Ft. Washington Way, Compliance Officer Cannon went to the site on May 4, 1989, to inspect the premises. Ironworkers were working on the bridge and barrels had been placed on the roadway to separate the work area from the travel zone. The Compliance Officer parked his vehicle behind the barrels and identified himself to Respondent's supervisory personnel and stated the purpose of his visit. There was an objection made to his inspection without a warrant, but he proceeded stating none was needed on a public road. His inspection resulted in the issuance of a citation to both parties alleging a violation of 29 C.F.R. §§ 1926.201(a) and 202. (Signaling and Barricades). Respondents contend the evidence from this inspection should be suppressed since a warrantless, nonconsensual inspection was made relying on *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). This reliance is misplaced.

Firstly, the area inspected was a public highway, being travelled throughout the inspection. Merely placing barrels on a part of the highway to direct the traffic and separate the workmen from the vehicular activity did not change the nature of the public traffic artery. The observations of the Compliance Officer of conditions which existed were in plain view of all who drove through

the area; the observations he made on the highway after parking his vehicle which were in plain view of all was not a constitutional violation. See *Stephenson Enter. Inc. v. Marshall*, 578 F.2d 1021 (5th Cir. 1978); Moreover, there was no "expectation of privacy" in the highway activity being observed. *U.S. v. Salvucci Jr.*, 448 U.S. 83, 100 S.Ct. 2547, 65 Led. 2d 619 (1980). Accordingly, the actions of the Compliance Officer were proper under the circumstances presented, and there was no fourth amendment violation.

The Respondent further contends that there was no basis for the warrant which allowed the Compliance Officer to inspect other areas of the worksite. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed. 2d 305, 6 BNA OSHC 1571 (1978) held that nonconsensual safety and health inspections by OSHA must be conducted pursuant to a warrant to comply with the probable cause requirement of the Fourth Amendment.

"Probable cause will be found to support an OSHA warrant if the warrant application supports a reasonable belief or leads to a reasonable suspicion that the OSHA Act or its regulations have been violated." See *Secretary of Labor v. Midwest Instruments Co.*, 14 BNA OSHC 1569, 1571 (No. 89-2819, 1990).

The warrant application herein was based not only on the plain view observation of the Compliance Officer of alleged violations, See *Stephenson Enterprises, Inc. v. Marshall*, supra., but on a detailed explanation of the general inspection plan OSHA utilizes which is based on

neutral criteria. See *In Re Establishment Inspection of Trinity Industries, Inc.*, 14 BNA OSHC 1531 (Nos. 89-1333, 89-1389, 89-1494, 1990).

Accordingly, it is concluded there was valid reason for the issuance of the warrant, and there is no basis for suppression of the evidence.

Docket No. 89-2611 - Tri-State Steel Construction, Inc.
Citation No. 1, Item (a) alleges:

29 C.F.R. § 1926.59(e)(1): Employer had not developed or implemented a written hazard communication program which at least describes how the criteria in 29 C.F.R. § 1910.1200 (f), (g) and (h) will be met:

(a) There was no written hazard communication program available at the time of inspection.

Section 1926.59 (e)(1) provides:

(e) Written hazard communication program. (1) Employers shall develop, implement, and maintain at the workplace, a written hazard communication program for their workplaces Which at least describes how the criteria specified in paragraphs (f), (g) and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met. . .

Citation No.1, item (b) alleges:

The written hazard communication program did not include a complete list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas):

(a) There was no list of hazardous chemicals on site at the time of the inspection for such materials as Atom Arc and Arcair welding electrode.

The standard at issue, 29 C.F.R. § 1926.59 requires employers to "develop, implement and maintain" a written hazard communication program which describes the employer's methodology for labels and other warning concerning hazardous materials; providing material safety data sheets, and the training of employees.

Cannon, the Compliance Officer testified that he found no written hazard communication program in effect solely for Tri-State. National did have such a program in use. (T-212) However, the evidence demonstrates that Tri-State is a subsidiary of National and both use the same program. Cannon admitted both companies have the same safety and loss control officer, use the same trailer where the hazard program was situated, and share the same supervisory personnel. (T-439) He did not cite National for violating 59(e)(1) stating "what National Engineering had in their trailer was sufficient ..." (T-443) The evidence is persuasive that both shared the same program - granted that National did not

violate the standard at issue, neither did Tri-Steel. The Secretary has not sustained her burden of proof as to a violation of 59(e)(1). The violation is vacated.

The Secretary alleges that Tri-State violated 29 C.F.R. § 1926.59(E)(1)(i) by failing to have a list of the hazardous chemicals known to be present at the worksite; *i.e.* Atom Arc and Arcair welding electrodes.

The standard requires that "a list of hazardous chemicals .... referenced on the appropriate MSDS" be present. Cannon specifically examined the MSDS sheets and photographed them. He did not see Atom Arc and Arcair Welding electrodes therein. While Respondent alleges another welding rod was listed, this does not meet with the standard requirements. These specific rods were not listed, and thusly employees checking the MSDS could not determine their physical and health hazards.

Cannon testified the hazard associated with welding rod use was nausea, pulmonary dysfunction, etc. (T-456-7)

Respondent knew there was no MSDS for these specific products. On the record, Tri-State was in violation of § 1926.59(e)(1)(i). A penalty of $200 is appropriate herein.

Item 2, Alleged Violation of 29 C.F.R. § 1926.59(f)(5)(ii)

Citation No. 1, Item 2 (a) & (b) alleges: 29 C.F.R. § 1926.59(f)(5)(ii): The employer did not ensure that each container of hazardous chemicals in the workplace is

labeled, tagged or marked specifying the appropriate hazard warning:

(a) Westbound Ft. Washington Way at split of north and southbound I-75 ramps. Equipment: Arcair copper clad electrodes. Condition: The Arcair electrodes were not provided with a hazard warning label to indicate the health effects of the materials contained therein.

(b) Location: Westbound Ft. Washington Way at split of north and southbound I-75 ramps. Equipment: Atom arc electrodes. Condition: There was no hazard warning label on the Atom arc electrodes to indicate the health effects of the materials contained therein.

Section 1926.59(f)(5)(ii) provides (5) ... the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the following information:

(ii) Appropriate hazard warnings.

The labels function is to apprise employees exposed to the chemical hazards of "both the change in body function and the signs and symptoms that may occur to signal that change."

The Secretary has interpreted this requirement to require that the label spell out the target organs effected by the hazards present. This interpretation is strengthened by the inclusion in Appendix A to § 1926.59 at paragraph 7 of target organ effects which may occur from exposure to hazardous chemical exposures. The

Secretary's interpretation of the standard is controlling, if it is reasonable. *GAF Corp. v. OSHRC*, 561 F.2d 913, 915 (D.C. Cir. 1977). The purpose of the standard is to protect employees form serious risks of health damage posed by hazardous chemicals which insidiously cause bodily damage.

The Secretary has reasonably determined there is a need for employees to know the hazards associated with chemical exposures in the workplace and be on guard with sufficient knowledge where possible. Section 59(d)(2) states that Appendix A shall be consulted for the scope of health hazards covered. Under Section 59(c) where health hazard is defined, reference is also made to further exploring Appendix A in defining chemical health hazards. In short, the Respondent was on notice by the hazard communication standards that labeling of deleterious chemicals must specifically call the attention of employees to the bodily target organs which may be effected by toxic, carcinogenic, corrosive, etc. chemicals (See Appendix A to § 1926.59). Mere words of caution on a label, or warnings that are general in nature do not suffice. Since the label serves as the advance notice to an employee of information designating the health hazard of working with certain chemicals, employees exposed to such hazards must be informed of the specific target organs which may be affected.

The Respondent knew or should have known that this specific information must be made available on the labels of hazardous chemical substances. It has a hazard communication program which made it so aware.

In the instant case the fume and gas decomposition chemical products formed could cause damage to the

lungs, and may act on the blood or hematopoietic system (See C-35 - MSDS Atom Arc Rods - Section II, V). The labels did not provide the "appropriate hazard warnings" as required. Accordingly, the citation alleging a violation of 29 C.F.R. § 1926.59(f)(5)(ii) is affirmed.

Consistent with the criteria set forth in Section 17(J) of the Act, a penalty of $200 is appropriate herein.

Item 3, Alleged Violation of 29 C.F.R. § 1926.59(g)(1)

The Secretary alleges that Tri-State violated 29 C.F.R. § 1926.59(g)(1) by failing to have an MSDS for Arcair Electrodes and Atom Arc Welding rods type 7018.

The Respondent argues that it had an MSDS for All-State Welding Rods which although from a different manufacturer do list the hazards present, and is applicable to the rods used herein.

This argument cannot be supported herein. Firstly, the Hazard Communication Standard specifically requires at 59(g)(1) that there be a "material safety data sheet for each hazardous chemical." This is so that workers may be provided with full information on every chemical they work with, apprised of the hazards concomitant thereto so that they can use caution and have knowledge where there is exposure. Undoubtedly, where they are working with different name products, the presence of an MSDS for each product will facilitate for such employees the use of the MSDS provided. Furthermore there is no evidence that the All-State Welding Rods were similar in all

respects to Arcair or Atom Arc Rods and presented the same chemical hazards. The evidence supports a finding that the Respondent violated 29 C.F.R. § 1926.59(g)(1). Consistent with the criteria set forth in 17(J) or the Act, a penalty of $200 is appropriate.

Item 4, Alleged Violation of 29 C.F.R. § 1926.59(h)

The Secretary alleges that Respondent violated 29 C.F.R. § 1926.59(h) in that employees were not provided with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard entered their work area.

The record establishes that while supervisory employees were given hazard communication training sometime in 1988 & 1989, employees did not get training until May 11, 1989. Prior thereto, there were no official training sessions on chemical hazards in the workplace. The Respondent's argument that giving employees packets of materials, etc. concerning safety qualifies as training under the standard is without merit. Training [1] in its ordinary understood usage means "to coach in or accustom to some mode of behavior or performance, to make proficient with specialized instruction and practice." No such course of procedure was followed here. The violation has been established. A penalty of $200 is considered appropriate.

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[1]The AmericanHeritage Dictionary, New College Edition, 1976, Houghton Mifflin Company, Publishers, p. 1361.

Item 5, Alleged Violation of 29 C.F.R. § 1926.100(a)

Tri-State was cited for violation of 29 C.F.R. 100(a) for failing to assure that employees exposed to possible danger of head injury wear protective helmets.

Section 1926.100(a) requires that employees "be protected" by the use of helmets "where there is a possible danger of head injury from impact, or form falling or flying objects ..." See *Franklin R. Lacy (Aqua View Apartments)*, 81 OSAHRC 7/A2, 9 BNA OSHC 1253, 1254, 1981 CCH OSHD ¶ 25,170, p. 31,073 (No. 3701, 1981).

The Compliance Officer testified that an employee was standing under an overpass on Route I-75 without wearing a hard hat and was subject to being struck by falling debris emanating from work activity overhead. Respondent's foreman Hunter, who was in conversation with the employee (employee was standing outside truck talking to Hunter, inside) stated he saw no concrete falling from above.

A review of the testimony and the photographs depicting the area strongly indicates that work was being carried out be welders on the roadway above. (Exh. C-37, 38) A gas cylinder used by welders is depicted in the photographs and the Compliance Officer positively stated he saw men working. Exhibit C-38 depicts an opening in the overhead span from which the testimony states debris was falling from. I find that an employee of Respondent was standing below an area where there was work activity being carried out without wearing a protective helmet and

was subject to being struck and injured by falling debris. The Respondent's foreman was present and knew or should have known of the danger present to the employee. The evidence establishes a violation of 29 C.F.R. § 1926.100(a). A Penalty of $250 is considered appropriate.

Item 6, Alleged Violation of 29 C.F.R. § 1926.351(b)(1)

A violation of 29 C.F.R. § 1926.351(b)(1) was alleged for failing to comply with the requirement that "all arc welding and cutting cables shall be of the completely insulated, flexible type."

The evidence clearly demonstrates that the insulation on the cable attached to the Denyo multi quip welding generator was torn exposing the wires. This presented a hazard of electrical shock to employees using the equipment. As to the allegations concerning the other generator (see item 6(b) of the citation) the evidence establishes the lead attachment to the generator was not insulated and presented an electrical hazard to employees who touched the lead at the attachment point. The standard requires the cable to be "completely insulated." The purpose is to protect employees from the hazard of electrical shock or even electrocution where there is any uninsulated point in the lead attachment. In both instances alleged herein there was such a hazard present and the Respondent's foreman Hunter was aware of this condition. The preponderance of the credible evidence establishes a violation of 1926.351(b)(1). A penalty of $100 is considered appropriate herein.

Citation No. 2, Item 1, Alleged Violation of 29 C.F.R. § 1926. - 201(a)(1) or in the alternative § 1926.202

The citation initially alleged a violation of 5(a)(1) of the Act, and was amended in the Complaint to cite the above standards.

Pursuant to a complaint that ironworkers employed by Tri-State were subject to the hazard of being struck by vehicular traffic while engaged in bridge reconstruction work, Compliance Officer Cannon visited the worksite located on an interstate highway described as Fort Washington Way westbound on May 4, 1989. He observed barrels in the roadway which were used to direct traffic and separate it from the work area. The "barrels were spaced at no particular distance ... from 40 to 70 or 75 feet, or somewhere in there." (Testimony of Cannon, T-190) There were three to four welders working on the highway behind the barrier (barrels). The Compliance Officer observed traffic cutting in behind and between the barrels close to the men at work putting them at the hazard of being struck.

After a meeting between the general contractor (The Jurgensen Co.), subcontractors Tri-State and National, and a representative from the Ohio Department of Transportation the distance between the barrels was reduced from 50 feet to 25 feet, and both a patrolman and flagman were used to thwart the vehicular traffic crossing behind the barrels which presented a work hazard. These additional steps did not solve the problem. The hazardous condition was remedied on May 7 by the

use of "barrels, 10 foot centers with ... mesh fencing" which formed a barrier preventing cross-overs.

The standard at issue, 29 C.F.R.§ 1926.201(a)(1) is concerned with signaling methods, specifically "flagmen." The standard requires the use of flagmen "when operations are such that signs, signals, and barricades do not provide the necessary protection. . ." Consequently, one cannot be in violation for failure to use flagmen unless the evidence shows they were not used, or at least not properly used. That element of proof is absent.

Tri-State did use flagmen in attempting to alleviate the problem, which proved unsuccessful. The Compliance Officer, who admittedly was against citing this section testified that flagmen "would be overburdensome costwise" (T-419), meaning they were not feasible under the circumstances existing. He stated, "In my own opinion, I don't believe the standard deals with the situation that we had at Fort Washington Way." (T-420) The citation therefore is vacated.)

In the alternative, a violation of 1926.202 is alleged. This standard requires that "Barricades for protection of employees shall conform to the portions of the American National Standards Institute D 6.1-1971, Manual on Uniform Traffic Control Devices for Streets and Highways, relating to barricades."

The standard requires that barricades shall conform to a listed ANSI Standard. Consequently, one can not be in violation unless this is proven. The Commission has held that:

In order to prove a violation of section 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2), the Secretary must show by preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (2) (sic) the employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126 (No. 78-6247, 1981).

The evidence of record does not establish that the Secretary met her burden of proof. OSHA's Compliance Officer testified that the standard at issue was not applicable "to the situation on Fort Washington Way." (T-418) Assuming the standard applies to this situation on the interstate highway, it was further incumbent on the Secretary to demonstrate by a preponderance of the evidence that the barriers existent there did not conform with the ANSI Standard. The Secretary presented no evidence on her essential element of proof. The citation, therefore, of an alleged violation of 1926.202 is vacated.

Docket No. 89-2705 - National Engineering & Contracting Company - Serious Citation - Item 1

Respondent National was cited for violation of 29 C.F.R. § 1926.28(a)[3] for failure to require an employee was operating a hammer drill to wear safety-toed shoes.

To establish a violation of 1926.28(a) the Secretary must prove that the employer had actual knowledge of the existence of the hazard which required the use of personal protective equipment, or that a reasonably prudent employer familiar with the relevant industry would require such use. *S & H Riggers & Erectors, Inc.*, 79 OSAHRC 23/A2, 7 BNA OSHC 1260, 1263, 1979 CCH OSHD ¶ 23, 480, p. 28,436 (No. 15855), rev'd 659 F.2d 1273 (5th Cir. 1981); *Ray Evers Welding Co. v. OSHRC*, 625 F.2d 726, 731, 8 BNA OSHC 1271, 1275 (5th Cir. 1980); *Bristol Steel & Iron Works Inc. v. OSHRC*, 601 F. 2d 717, 724, 7 BNA OSHC 1462, 1465-6 (4th Cir. 1979)

It was incumbent on the Secretary to "provide evidence from persons qualified to express such opinions" that the personal protective means specified were necessary within the industry involved. *See L.R. Willson & Sons, Inc. v. OSHRC*, 698 F.2d 507 513, 11 BNA OSHC 1097, 1101 (D.C. Cir. 1983): *Ray Evers Welding Co., supra* at 625 F.2d 733; *Cape and Vineyard Div. of the New Bedford Gas & Edison Light Co. v. OSHRC*, 512 F.2d 1148, 1155, 2 BNA OSHC 1628, 1633 (1st Cir. 1975). Compliance Officer Cannon testified he observed an employee using an air hammer to chip concrete and was not wearing safety-toed shoes; and "there is a good potential for

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[3](sic) **§ 1926.28 Personal protective equipment.**

(a) The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where thee is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

fractured toes." Sorrell, the employee identified as being without safety-toed shoes testified he was not chipping with the air hammer, but was doing a drilling operation. Hunter, the general foreman on the job corroborated Sorrell's testimony that he was drilling not chipping with the air hammer. He testified in the drilling operation the drill does not bounce around as happens with chipping, but stays down in the hole, and is not a toe hazard for employees.

The testimony of both Sorrell and Hunter casts some doubts on the Compliance Officer's knowledge of what type of operation was being conducted, and therefore dilutes his opinion as to the alleged risks.

There is no persuasive evidence presented by the Secretary that the employee was exposed to a hazardous condition requiring to use of safety-toed shoes. Furthermore the citation must be vacated due to the Secretary's failure to prove by a preponderance of the evidence that a reasonable person familiar with the circumstances of the industry would have protected against the hazard as specified by the Compliance Officer. Based on the foregoing, serious citation 1, item 1 is vacated.

Citation No. 1, Item 2(a),
Alleged violation of 29 C.F.R. § 1926.59(e)(1)(i)

The Secretary alleges Respondent violated this standard in that it did not have a list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate MSDS. The Compliance

Officer testified he was shown a master list of hazardous chemicals on which a number of hazardous chemical used were missing. He photographed the list (Exh. C-8-28) and stated a number of photographs did not develop but these missing chemicals were not on the list. Respondent through Banner its safety officer produced a list of chemicals allegedly drawn up on March 3, 1991, which listed as present all chemicals not previously found by the Compliance Officer.

After reviewing and observing both men testify, I find that the testimony of Cannon demonstrating that the list given to him did not contain the hazardous chemicals listed is infinitely more reliable than a belated list prepared and now put forth as being in existence. The photographs and testimony amply demonstrates this listing was incomplete. If the complete list was in existence, the Respondent was fully on notice as to what the Compliance Officer was seeking, and could have provided it then and there. The total evidence re-enforces the reliability of the findings by the Compliance Officer on this change, and the citation is affirmed.

Citation No. 1, Item 2(b),
Alleged violation of 29 C.F.R. § 1926.59(f)(5)(i)

This standard, which pertains to hazard communication programs states:

(f) Labels and other forms of warning.

* * * * *

(5) Except as provided in paragraphs (f)(6) and (f)(7) the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the following information:

(i) Identity of the hazardous chemical(s) contained therein;

The citation alleges that there were four containers of hazardous materials which were not so labeled, tagged or marked with their identity. Specifically, the Compliance Officer saw a can of gasoline, a portable fuel storage tank containing No. 2 diesel fuel, a fuel tank sitting on the back of a Chevrolet truck which contained No. 2 diesel fuel, and a propane tank all without the necessary identification as required by the standard. The Respondent alleges that the size, shape, and color of these objects sufficiently identifies them, *i.e.*, red container signifies it has gasoline, propane tank was identifiable by its configuration and coloring, *etc.* This argument is without merit. To ensure that employees are made fully aware of chemical hazards, employers are required to label, tag or mark each other container of hazardous chemicals.

In plain, unambiguous language the standard states the containers must show the "identity of the hazardous chemicals contained therein." Section 1926.59 (c) states "identity means any chemical or common name which is indicated on the MSDS for the chemical." No such description was placed on the containers herein. The Respondent knew that hazardous chemicals were in the containers and did not identify them as required. Citation No. 1, item 2(b) alleging a violation of 29 C.F.R. § 1926.59(f)(5)(i) is affirmed.

Citation No. 1, Item 2(c),
Alleged Violation of 29 C.F.R. § 1926.59(f)(5)(ii)

This standard requires that the employer ensure that each container of hazardous materials is labeled, tagged or marked with appropriate hazard warnings. The Secretary alleges that in nine instances Respondent failed to comply. In four instances, there were no identifying labels at all, *i.e.,* Items (a) 5-gallon can of gasoline, (b) 1-gallon can of gasoline, (d) Propane storage tank, and (h) Fuel storage tank on Chevrolet truck which contained No. 2 diesel fuel. The standard requires each container be labeled, tagged or mark with appropriate hazard warnings. Absent any such warnings as occurring in the above, the standard is violated. Once again the same argument is made that the size, shape of the objects sufficiently identifies them. This is rejected as totally without merit.

On the remaining five items found in violation, *i.e.*, (c) 35 5-gallon containers of Poly Carb, (e) Universal tractor fluid, (f) Koch high penetration primer 5952, (g) Sikadur 32, (i) Xylene; none met the requirements of the standard that warning be given to employers of the health hazard present when used. Merely printing words such as hazardous, or corrosive, or flammable does not meet the requirements that the employees be made aware of the bodily systems and organs at risk. The discussion and findings related to a violation of this section stated previously in relation to Tri-State is applicable herein. The Respondent knew or should have known of the failure to mark its materials with the necessary hazard information. The employees could suffer serious and severe injuries from the chemicals involved. The violation of 29 C.F.R. §§ 1926.59(e)(1)(i), .59(f)(5)(i) and .59(f)(5)(ii) are affirmed. A combined penalty of $400 is considered appropriate.

Citation No. 1, Item 3,
Alleged Violation of 29 C.F.R. § 1926.59(g)(1)

The Secretary alleges that National violated 29 C.F.R. § 1926.59(g)(1) by failing to have an MSDS for Koch high penetration primer No. 5952, Seal Tight Hi Spec polymeric compound, Hilti Hit C100 dowelling, and Vulcan Super Prem SAE 30. The standard requires there be "a material safety data sheet for each hazardous chemical."

The Compliance Officer testified he examined Respondent's MSDS's on May 10, 1989, at the worksite, and there were none for the five items listed. He requested them and counsel provided an MSDS for Seal Tight Hi Spec, Hilti Hit C100 and Universal tractor fluid at his office on June 2, 1989.

Respondent avers that all MSDS's were provided and there was no violation. This argument is without merit. The purpose of the Hazard Communication Program is to provide employees an opportunity to have total information regarding the hazards pertaining to the chemicals used in performing their job. Thusly, the necessary information must be available to them at the worksite where their contact with the chemicals occurs. The Compliance Officer noted the hazardous nature of the chemicals in the missing MSDS's, all of which were known to the Respondent. These chemicals could cause serious illness or injury. The violation of the standard at 1926.59(g)(1) is affirmed. A penalty of $200 is considered appropriate for the violation.

Citation No. 1, Item 4,
Alleged Violation of 29 C.F.R. § 1926.100(a)

Section 1926.100(a) requires that employees "be protected" by the use of helmets "where there is a possible danger of head injury from impact or from falling of flying objects. . ." *See Franklin R. Lacy, supra.*

The Compliance Officer observed Scott Febus, Respondent's assistant job superintendent, working with foreman Robert Hunter under the I-75 overpass. Febus was not wearing any head protection, while Hunter did have one on. The Compliance Officer noted debris falling from overhead where arc welding was being carried out, and Febus was subject to being struck by debris. While Hunter testified he saw no debris falling, a review of the total evidence including the photographs of the area present substantial evidence to support a finding that Febus was in danger of being struck by overhead debris. The Respondent's foreman knew of said danger and took means to protect himself by wearing a hard hat. The violation os 1926.100(a) is affirmed. It is noted that the citation listed two instances of violation; however, one allegation was withdrawn at the hearing. Based on the remaining violation, a penalty of $350 is appropriate.

Citation No. 1, Items 5(a) & (b),
Alleged Violation of 29 C.F.R. 1926.102(a)(1)

Section 1926.102(a)(1) requires that "employees shall be provided with eye and face protection when machines or operations present potential eye and face injury from physical, chemical or radiation agents." Thusly, the employees are required to wear safety glasses meeting

requirements of the ANSI 287.1-1968 standard that is incorporated by reference at 29 C.F.R. § 1926.102(a)(2).

The Compliance Officer observed an employee (Sorrell) using a saw to cut a concrete parapet. He observed flying chips and pieces emanating from the operation, and stated the employee was at hazard with possible injury to his face and eyes since he was not wearing safety glasses, but merely ordinary sunglasses. (See photograph Exh. C-66) The evidence substantiates that this employee was not wearing impact resistance type glasses meeting the safety requirements required by the standard, and that the operation of the saw presented the potential for eye injury.

Additionally, the Compliance Officer observed another employee working within 10 feet of the breaker operation without wearing safety glasses for protection from flying debris. AAlthough this employee did have safety glasses, they were perched upon his forehead, and were not protecting his eyes exposing him to potential eye and face injury. The area around the breaking operation constituted a zone of danger and the employee not wearing his safety glasses had access thereto. *See Daniel Int'l Corp. v. Donovan*, 705 F.2d 382, 387-8, 11 BNA OSHC 1305, 1309 (10th Cir. 1983).

The Respondent was aware of the potential for eye and face injuries from the type of work being done; it had previously recorded eye injuries in its operation. A violation of the standard at 1920.102(a)(1) is affirmed. A penalty of $300 is considered appropriate herein.

Citation No. 1, Items 6(a) & (b),
Alleged Violation of 29 C.F.R.§ 1926.151(a)(3)

The Secretary alleges there were two situations where a fire hazard existed, and Respondent had failed to post signs stating "No Smoking or Open Flames" as required. The Compliance Officer observed numerous cans of Poly Carb, a highly flammable substance stored on the inside of a storage trailer, and on the outside near tthe entrance. The trailer and its outside vicinity was used by the employees to obtain the needed materials. There was a no-smoking sign on a tank which the compliance Officer estimated to be 50-60 feet from the flammable material; the Respondent alleged this sign was 20 feet away. In any case, the sign was not what a reasonable person would hold to be in the vicinity of operations which constitute a fire hazard. The standard is designed to protect employees from a fire hazard; in that since the warning sign should be in close proximity to the flammable material, not 20 feet nor longer away.

The Respondents knew of the presence of the flammable materials from the MSDS kept on the premises therefor. The employees were subject to a fire hazard while dealing with the poly carb material. A violation of the standard has been proven. A penalty of $150 is considered appropriate herein.

Citation No. 1, Item 7,
Alleged Violation of 29 C.F.R. § 1926.152(a)(1)

Respondent was cited for failure to use an "approved" container for storing flammable liquids.[4] The undisputed

testimony of the Compliance Officer was that employees used a one gallon can of gasoline in their work activity which was non-approved and clearly exposed the employees using it to the hazard that the gasoline fumes that could ignite and cause serious burn injuries. The Respondent contends the un-approved gasoline can being used was rented, and since the gasoline was in the original container there is no violation. There is absolutely no merit in this allegation. It was incumbent upon the Respondent to protect its employees from possible serious injury by using an approved container. The Respondent knew of the presence of flammable materials and with reasonable diligence could have protected against the violative conditions. Its employees had access to the hazard created by the hazardous condition. A violation of the standard at 1926.152(a)(1) is affirmed. A penalty of $150 is considered appropriate herein.

Citation No. 1, Item 8
Alleged Violation of 29 C.F.R. § 1926.152(g)(11)

The Secretary alleged that Respondent failed to comply with 29 C.F.R. §1926.152(g)(11), in that there was no fire extinguisher within 75 feet of a flammable liquid storage area, *i.e.*, in an area where a full storage tank contained diesel fuel. The evidence demonstrates there was a fire extinguisher directly under the tank; however, the Compliance Officer alleged a violation on the theory

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[4] § 1926.152 Flammable and combustible liquids.

(a) General requirements. (1) Only approved containers and portable tanks shall be used for storage and handling of flammable and combustible liquids . . .

that being below the tank the extinguisher would be inaccessible if there was a fire. This interpretation conflicts with the plain language of the statute which mandates that "an extinguisher be within 75 feet. . . of the service area." Clearly, the extinguisher herein was within this parameter. ". . .an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires. . . *See Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). The Secretary's interpretation of the standard conflicts with its plain meaning and fails to provide employers with fair notice of their obligations under the standard.

The citation alleging a violation of 29 C.F.R. § 1926.152(g)(11) is vacated.

Citation No. 1, Item 9,
Alleged Violation of 29 C.F.R. § 500(d)(1)

National was cited for violation of 1926.500(d)(1), for failing to provide fall protection for employees working on the I-75 ramp about 20 feet above ground level. The standard requires an opensided floor to have standard railings as specified in 1926.500(f)(1)(i).

the Compliance Officer observed three men working on the bridge roadway not protected from a fall of 20 feet. A parapet in existence about 29 inches high did not meet the guardrail required under the standard. The Respondent knew or with due diligence could have known of the fall hazard present. Its foreman was present during the work activity, and furthermore it had notice that the guardrailing was removed from the parapet during the repair work. A fall from the bridge ramp could have caused serious injury. The citation alleging a

violation of 29 C.F.R. § 1926.500(d)(1) is affirmed, and a penalty of $350 is appropriate herein.

Citation No. 1, Item 10, Alleged Violation of 29 C.F.R. § 1926.600(a)(3)(i)

The standard at 29 C.F.R. § 1926.6000(a)(3)(i) requires that heavy machinery, equipment or parts thereof which are suspended or held aloft by use of slings, hoists or jacks be substantially blocked or cribbed to prevent falling or shifting before employees are permitted to work under or between them. The Compliance Officer testified he observed a backhoe "being held off by the outriggers with two employees under it." The backhoe was not blocked or cribbed to prevent it from falling. The evidence demonstrates that there were employees working under the suspended backhoe who were in danger of sustaining serious injury if the backhoe tilted or fell. The record supports a finding of noncompliance with the standard, and that the employees had access to the cited condition. Furthermore, the Respondent knew or with the exercise of reasonable diligence, could have known of the violative condition. The citation for serious violation of 29 C.F.R. § 1926.600(a)(3)(i) is affirmed. A penalty of $150 is reasonable and appropriate under section 17(J) of the Act.

Citation No. 2, Item 1, Alleged Violation of 29 C.F.R. § 1926.201(a)(1) or in the alternative § 1926.202

These are similar violations to those to which Tri-State was cited. The area where this violation took place is different. The Compliance Officer observed four men

working at a table that was set up on sawhorses installing form work to re-pour a parapet located on the highway. The area involved was where the I-75 southbound ramp from Ft. Washington Way merged with southbound 75. There were barrels along this route, however, the Compliance Officer found that the barrels ended approximately 27 feet from the area where the men were working and they were at hazard of being struck by vehicular traffic. He stated that two more barrels which were on the traffic plan were missing, and that these were required to warn motorists of men at work, and to separate the traffic lane from the work area.

It is the Secretary's burden, to establish that the Respondent knew or, with the exercise of reasonable diligence, could have known of the violative condition. *Astra Pharmaceutical Products, Inc.*, supra.

The traffic situation herein differs markedly from the area Tri-State was involved wherein traffic was cutting in between barrels close to the men working. Here no vehicular traffic would cross into the right lane since there was a visible parapet there; furthermore the highway vehicles were traversing on was slightly higher than the right adjacent roadway where the men were constructing forms; additionally, a white line on the roadway further introduced to the drivers the nature of the roadway, i.e. there was only one lane going to Covington, Kentucky, at the point involved herein. There was at least one half mile of roadway past the work area before the drivers needed to move to the right in order to get to their destination. The Respondent was aware of these factors. There is no evidence that the Respondent knew there was a hazardous condition present or could have known it with reasonable diligence. With the factors present as

stated above, it cannot be said National failed to exercise reasonable diligence. The alleged violation of 29 C.F.R. § 1926.201(a)(1) or in the alternative 1926.202 is vacated.

Another cogent reason to vacate these citation is the testimony of the Compliance Officer that both sections are not applicable to the situation at hand. The Secretary did not disprove or give any evidence to vitiate the testimony of its main witness.

Citation No. 3, Item 1, Alleged Violation of 29 C.F.R. § 1926.350(j) - Section 3.2.4.3. ANSI Z49.1-1967

The Respondent was cited for a non-serious violation of 1926.350(j) for failure to assure that oxygen cylinders in storage separated from fuel-gas cylinders or other combustibles by a minimum distance of 20 feet or by a noncombustible barrier at least five feet high having a fire-resistance rating of at least one-half hour in accordance with ANSI Z49.1 1967 Article 3.2.4.3. The Compliance Officer observed oxygen cylinders approximately nine feet from flammable materials which were placed inside a storage trailer. (Exh. C-69, C-77) The flammable items were inside the trailer and separated from the oxygen by the trailer wall. The language of the statute requires the separation be by a noncombustible barrier at least 5 feet high. There was the wall barrier present. As part of its prima facie case the onus was on the Secretary to prove that said wall barrier was not the prescribed fire resistant barrier contemplated by the standard. That essential element of proof is missing. The citation is vacated.

AFFIRMATIVE DEFENSE - EMPLOYEE MISCONDUCT

Respondents National and Tri-State claim that even if there was a violation concerning failure to wear hard hats, failure to wear safety-toed shoes, and failure to wear safety glasses, it was the result of employee misconduct and should not be chargeable to to them since their safety program specifically directed employees to use the protected devices required.

Firstly, no violation was found regarding the use of safety-toed shoes (Citation No. 1, item 1 was vacated). The evidence of record establishes that the Secretary made out a prima facie case of a violation of the Act with reference to the failure to have employees wear hard hats (violation found against both National and Tri-State) and failure to have employees wear safety glasses (violation against National).

To establish the employee misconduct defense the employer must show that the violation resulted from employee actions which contravened a company work rule that was effectively communicated and unuformly enforced. *H.B. Zachry Co. v. OSHRC*, 7 BNA OSHC 2202, affirmed, 638 F2d 812 (5th Cir. 1981); *Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270 (6th Cir. 1987) cert. denied, 108 S.Ct. 479, 98 L.Ed. 2d 509 (1987).

While employers are not strictly liable for their employees' conduct, the onus of compliance with the Act is on the employer, who has the duty to communicate and enforce feasible work rules in order to avoid liability for the violative conduct of its employees. *L.E. Myers*, supra, at 1277, citing S.Rep. 1282, 92st Cong., 2d Sess. 10-11,

reprinted in 1970 U.S. Code Cong. & Admin. News 5177, 5182; *Towne Constr. Co. v. OSHRC*, 847 F.2d 1187 (6th Cir. 1988); *Danco Constr. Co. v. OSHRC*, 586 F.2d 1243 (8th Cir. 1978) ([Respondent] cannot fail to properly train and supervise its employees and then hide behind its lack of knowledge concerning their dangerous work practices").

The Secretary may prove an employer's knowledge of a preventable hazard "upon the introduction of proof of the employer's failure to provide adequate safety equipment or to properly instruct its employees on necessary safety precautions." *L.E. Meyers*, supra, at 1277, noting *Brennan v. OSHRC*, 511 F.2d 1139, 1143, n.5 supra, at 1277, noting *Brennan v. OSHRC*, 511 F.2d 1139, 1143, n.5 (9th Cir. 1975) and *Danco*, supra. "[T]he employer . . . must demonstrate that program's effectiveness in practice as well as in theory." *Towne Constr.*, supra, citing *L.E. Myers*, supra.

Respondents failed to demonstrate that it had established work rules designed to prevent safety violations that was adequately communicated and effectively enforced , or had taken steps to discover these violations. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1979 CCH OSHD 23, 664 (No. 76-1538, 1979); *Textland Drilling Corp.*, 9 BNA OSHC 1023 (No. 76-5307, 1980). The presence of supervisory personnel at or near when the violations occurred indicate Respondents knew or could have with reasonable didlgence known of the violations. *Pennsylvania Power & Light Co. v. OSHRC*, 737 F2d 350, 11 BNA OSHC 1985 (3rd Cir. 1984). Respondents failed to demonstrate by a preponderance of the evidence that its

safety program in practice was "thorough and adequate" and diligently enforced. Their defense of employee misconduct must fail.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact and conclusions of law contained in this opinion are incorporated herein in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Any proposed findings or conclusions not contained in this opinion are neither found nor concluded.

ORDER - IN RE: TRI-STATE STEEL CONSTRUCTION, INC.

In view of the foregoing, good cause appearing therefore, it is ordered that:

1) The allegation of serious violation set forth at 29 C.F.R. 1926.59(e)(1) found in item 1(a) is vacated. Item No. 1(b) alleging a serious violation of 29 D.F.R. 1926.59(e)(1)(i) is affirmed and a penalty of $200 is assessed.

2) The allegations of serious violations set forth at 29 C.F.R. 1926.59(f)(5)(ii) found in items 2(a) and 2(b) of citation No. 1 are affirmed, and a penalty of $200 is assessed, to reflect both items.

3) The allegations of serious violations set forth at 29 C.F.R. 1926.59(g)(1) found in items 3(a) and 3(b) of citation No. 1 are affirmed, and a penalty of $200 is assessed, to reflect both items.

4) The allegation of a serious violation set forth at 29 C.F.R. 1926.59(h) found in item 4 of citation No. 1 is affirmed, and a penalty of $200 is assessed.

5) The allegation of a serious violation of 29 C.F.R. 1926.100(a) found in item 5 of citation No. 1 is affirmed, and a penalty of $250 is assessed.

6) The allegations of serious violations set forth at 29 C.F.R. 1926.351(b)(1) found in items 6(a) and 6(b) of citation No. 1 are affirmed, and a penalty f (sic) $100 is assessed, to reflect both items.

7) The allegations of serious violations set forth at 29 C.F.R. 1926.201(a)(1) or in the alternative 29 C.F.R. 1926.201(a)(1) or in the alternative 29 C.F.R. 1926.202 found in item No. 1 of citation No. 2 are vacated.

ORDER - IN RE: NATIONAL ENGINEERING & CONTRACTING COMPANY

In view of the foregoing, good cause appearing therefore, it is ORDERED that:

1) The allegation of serious violation set forth at 29 C.F.R. 1926.28(a) found in item 1 of citation No. 1 is vacated.

2) The allegation of serious violations set forth at 29 C.F.R. 1926.59(e)(1)(i), 29 C.F.R. 1926.59(f)(5)(i), and 29 C.F.R. 1926.59(f)(5)(ii) found in items 2(a) through 2(i) of citation No. 1 is affirmed and a penalty of $400 is assessed to reflect all items.

3) The allegation of serious violations set forth at 29 C.F.R. 1926.59(g)(1) found in item 3(a) through (e) of citation No. 1 is affirmed, and a penalty of $200 is assessed, to reflect all items.

4) The allegation of serious violation set forth at 29 C.F.R. 1926.100(a) found in item 4(b) of citation No. 1 is affirmed, and a penalty of $350 is assessed.

5) The allegation of serious violation set forth at 29 C.F.R. 1926.102(a)(1) found in items 5(a) and (b) of citation No. 1 is affirmed, and a penalty of $300 is assessed to reflect all items.

6) The allegation of serious violation set forth at 29 C.F.R. 151(a)(3) found in items 6(a) and (b) of citation No. 1 is affirmed, and a penalty of $150 is assessed, to reflect all items.

7) The allegation of serious violation set forth at 29 C.F.R. 1926.152(a)(1) found in item7 of citation No. 1 is affirmed, and a penalty of $150 is assessed.

8) The allegation of serious violation set forth at 29 C.F.R. 1926.152(g) (11) found in item 8 of citation No. 1 is vacated.

9) The allegation of serious violation set forth at 29 C.F.R. 1926.500(d)(1) found in item 9(a) through (c) of citation No. 1 is affirmed, and a penalty of $350 is assessed to reflect all items.

10) The allegation of serious violation set forth at 29 C.F.R. 1926.600(a)(3)(i) found in item 10 of citation No. 1 is affirmed, and a penalty of $150 is assessed.

11) The allegation of serious violation set forth at 29 C.F.R. 1926.201(a)(1) or in the alternative 29 C.F.R. 1926.202 found in item 1 of Citation No. 2 is vacated.

12) The allegation of other than serious violation of 29 C.F.R. 1926.350(j) found in item 1(a) of citation No. 3 is vacated.

IRVING SOMMER /s/
Judge, OSHRC

DATED:
Washington, D.C.